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ABSTRACT

This issue of "this Constitution" is devoted to commemorating the bicentennial of the Bill of Rights of the U.S. Constitution. Materials include: "A Chronology of Civil Liberties and Civil Rights in the United States" (Herman Belz); "Constitutional Power to Enforce Individual Rights: The Legacy of McCulloch v. Maryland" (J. Woodford Howard Jr.); "The Nineteenth-Century Revolution in Civil Liberties: From 'Rights in Property' to 'Property in Rights'" (James A. Henretta); "The Reality of Rights in an Atolerant Society" (Joel B. Grossman; Charles R. Epp); "Roundtable of Participants in the Passage of the Civil Rights Act of 1964" (Raymond E. Wolfinger); "What Americans Should Know about the Bill of Rights: Eight Lessons" (Mark P. Petracca); a lesson for the classroom: "Abigail Adams on the Constitutional Rights of Women" (Corinne Wright); and "The Bill of Rights: A Bibliography" (Kermit L. Hall). A final section called "Bicentennial Gazette" provides a list of Bill of Rights resource organizations. (DB)

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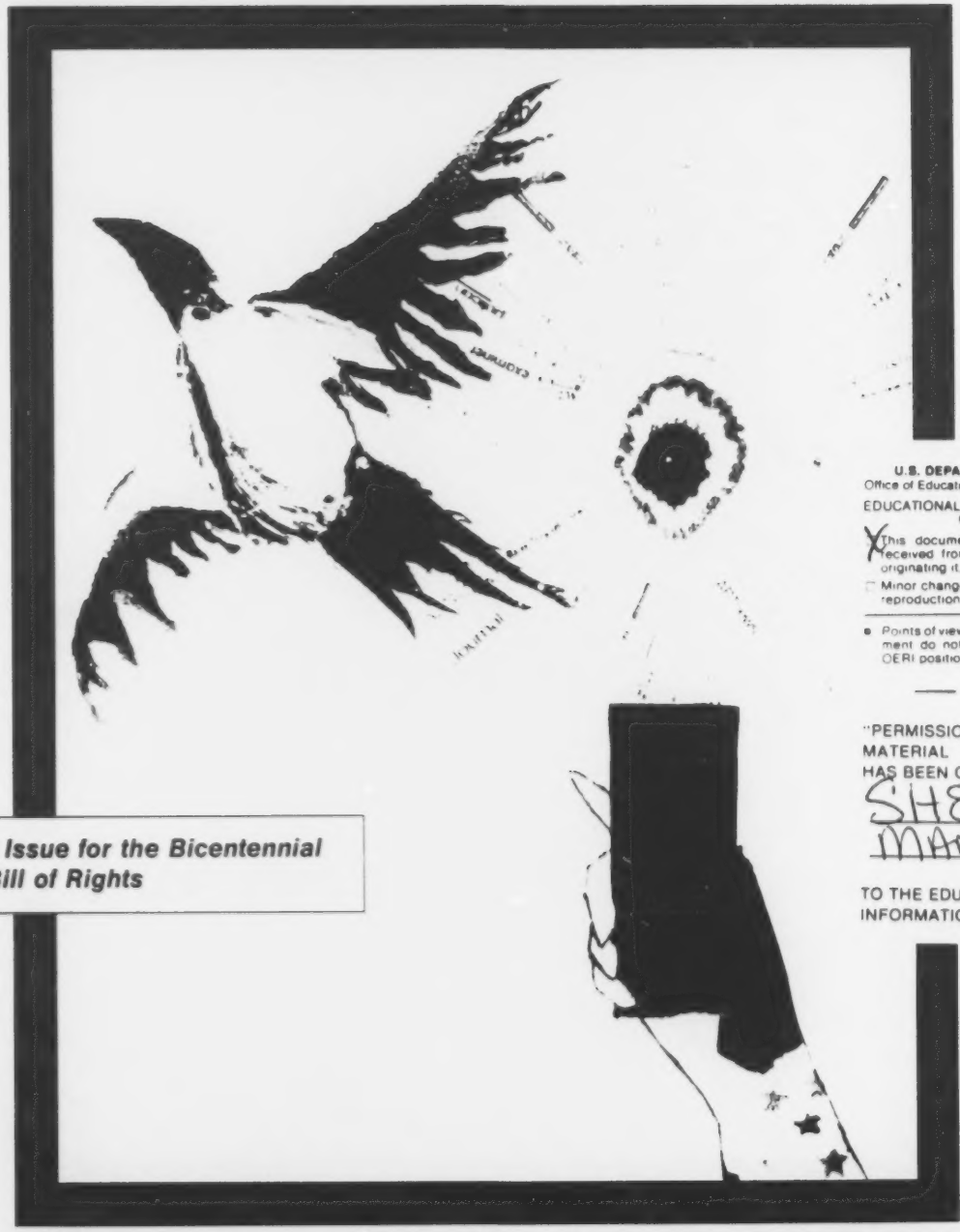
...do ordain and establish this Constitution for the United States of America.

The Bicentennial of the Bill of Rights Fall 1991, No.19



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Special Issue for the Bicentennial of the Bill of Rights

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Project 87

A Chronology of Civil Liberties and Civil Rights in the United States

by HERMAN BELZ

The historic purpose of Anglo-American constitutionalism has been to impose limits on government in order to protect the liberty and rights of individuals. Civil liberties are legally enforceable claims barring government from infringing religious, political, intellectual, and economic freedoms. The principal civil liberties that are protected by American constitutional law are freedom of speech, freedom of the press, freedom of assembly and association, religious freedom, the right of privacy, and the right to due process of law. The term "civil rights" by contrast refers to legally enforceable claims by individuals requiring governments to ensure equal treatment by both government and private citizens in the various spheres of public and private life such as military service, employment, education, and housing.

The Declaration of Independence proclaimed that the object of government—and by implication the purpose of the nation that it called into existence—was the protection of individuals' natural rights to life, liberty, and the pursuit of happiness. In order to secure liberty and rights, the states adopted written constitutions and organized a national union under the Articles of Confederation. To provide more effective protection of liberty and rights, the Constitution of 1787 was adopted, creating a stronger national government. From the beginning of our national existence, the definition, regulation, and protection of civil liberties and civil rights has been an essentially political project, carried on by the people through the instrumentalities of representative government. These institutions have included legislative assemblies, executive and administrative agencies, and judicial bodies within the formal constitutional structure, and political parties, voluntary private associations, and communications media outside the governmental structure.

In the early national period and in the nineteenth century, liberty and rights were chiefly within the jurisdiction of the state governments. In the twentieth century, civil liberties and civil rights have been regulated to a far greater extent by the national government. In the present century, moreover, the judicial branch has actively joined the political branches in the work of protecting individual rights. This chronology is intended to provide an outline of these developments in the history of civil liberties and civil rights in the United States.

1776

Declaration of Independence: Adopted by the Continental Congress to announce national independence and assert the ideas of liberty, equality, and government by consent as principles of American government; provides documentary basis and normative standard for civil liberties and civil rights in U.S.

1776-1780

State constitutions: People in states organize sovereign power as political communities for purposes of self-government and protection of individual and community liberty; many state constitutions contain declarations or bills of rights specifying the most important rights to be protected against government.

1777

Articles of Confederation: Adopted by Congress and ratified by the states in 1781 as plan of national union providing for "the security of their liberties" and "their mutual and general welfare"; declares free inhabitants of each state entitled to all the privileges and immunities of free citizens in the several states, including movement to and from states and the carrying on of trade and commerce therein.

1780-1786

Emancipation in northern states: Legislation is enacted providing for gradual abolition of slavery in Pennsylvania (1780), Connecticut and Rhode Island (1784), New York (1785), New Jersey (1786); Massachusetts Constitution interpreted in 1783 as having abolished slavery.

1787

Northwest Ordinance: Adopted by Confederation Congress as instrument of territorial government; extends right of self-government to free males, promising admission to the Union as states on an equal basis with existing states; guarantees freedom of worship, benefit of writ of habeas corpus and trial by jury, protection of liberty and property against deprivation except in accordance with law of the land and with full compensation if taken for a public purpose; provides public support for education; prohibits slavery and permits fugitive slaves to be reclaimed.

United States Constitution: Federal Convention creates extended republican government for the nation to protect liberty, property, administration of justice for individuals against interference by state governments; guarantees privilege of the writ of habeas corpus and trial by jury, prohibits bills of attainder and ex post facto laws; secures obligation of contracts against impairment by states; protects privileges and immunities of citizens in the several states; prohibits religious test for office holders; defines treason narrowly to protect

Continued on page 73

Herman Belz is professor of constitutional history at the University of Maryland and the author of *Equality Transformed: A Quarter Century of Affirmative Action* (New Brunswick: Transaction Publishers, 1991).

...do ordain and establish
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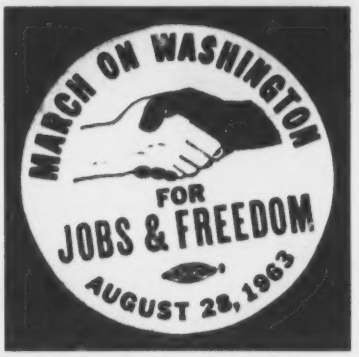
The Bicentennial of the Bill of Rights

No. 19 Special Issue, Fall 1991



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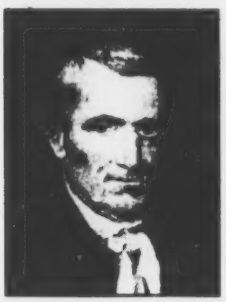

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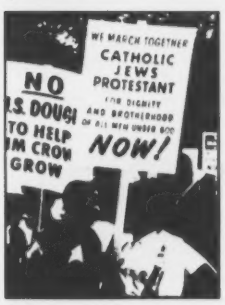

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This special issue of *this Constitution*, devoted to the Bill of Rights in honor of its Bicentennial, is dedicated to the memory of Richard B. Morris.

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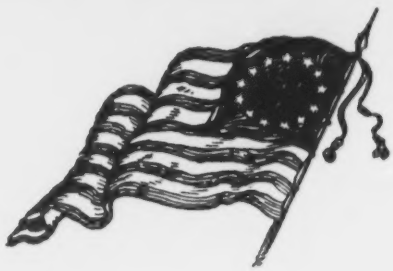

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From the Editors

In the Spring/Summer of 1988, we bid farewell to the readers of ***this Constitution: A Bicentennial Chronicle*** with issue no. 18, which was devoted to the Bicentennial of the Bill of Rights. Project '87 itself was expected to come to an end within a year after the Constitutional Bicentennial of 1987. We were pleased to find, however, that the Project '87 publications, including back issues of ***this Constitution***, were still very much in demand. These issues of the magazine have been distributed widely in the last three years. In addition, a collection of the documentary essays from the magazine is now available to teachers and students in American history and American government courses. Entitled *Ideas of the Founders on Constitutional Government* and produced by John Patrick, the collection also includes lessons for students and notes for teachers; its publication is funded by the Commission on the Bicentennial of the United States Constitution. (See the Bill of Rights Bibliography in this issue for further information.)

We also learned that our audience, particularly high school and college teachers, were interested in more resources about the Bill of Rights and its evolution. With the support of a grant from the Ford Foundation, we have prepared a special new issue of ***this Constitution*** on civil rights and civil liberties in the United States. The special issue of ***this Constitution*** is being distributed to high school social studies curriculum supervisors and department chairs, history and civics teachers, college faculty who specialize in constitutional history and law, as well as to officers of organizations responsible for programs on the Bill of Rights, including state humanities councils, law related and civic education organizations, the League of Women Voters, and the Jefferson Foundation.

We expect this issue to be especially useful as attention is drawn to the coming Bicentennial of the ratification of the Bill of Rights on December 15, 1991. This date symbolizes the close of the era of the Bicentennial of the United States Constitution, one that will be marked by special programs throughout the United States. We find that these efforts are leaving a continuing legacy of enhanced attention to the study of our constitution, its principles, history, and continuing evolution. Project '87, the joint effort of the American Historical Association and the American Political Science Association, all of the scholars who served as its advisors and contributors, and the foundations which made our program efforts possible, are proud to have contributed to the legacy of a celebration marked by cerebration.

Sheilah Mann

Cynthia Harrison

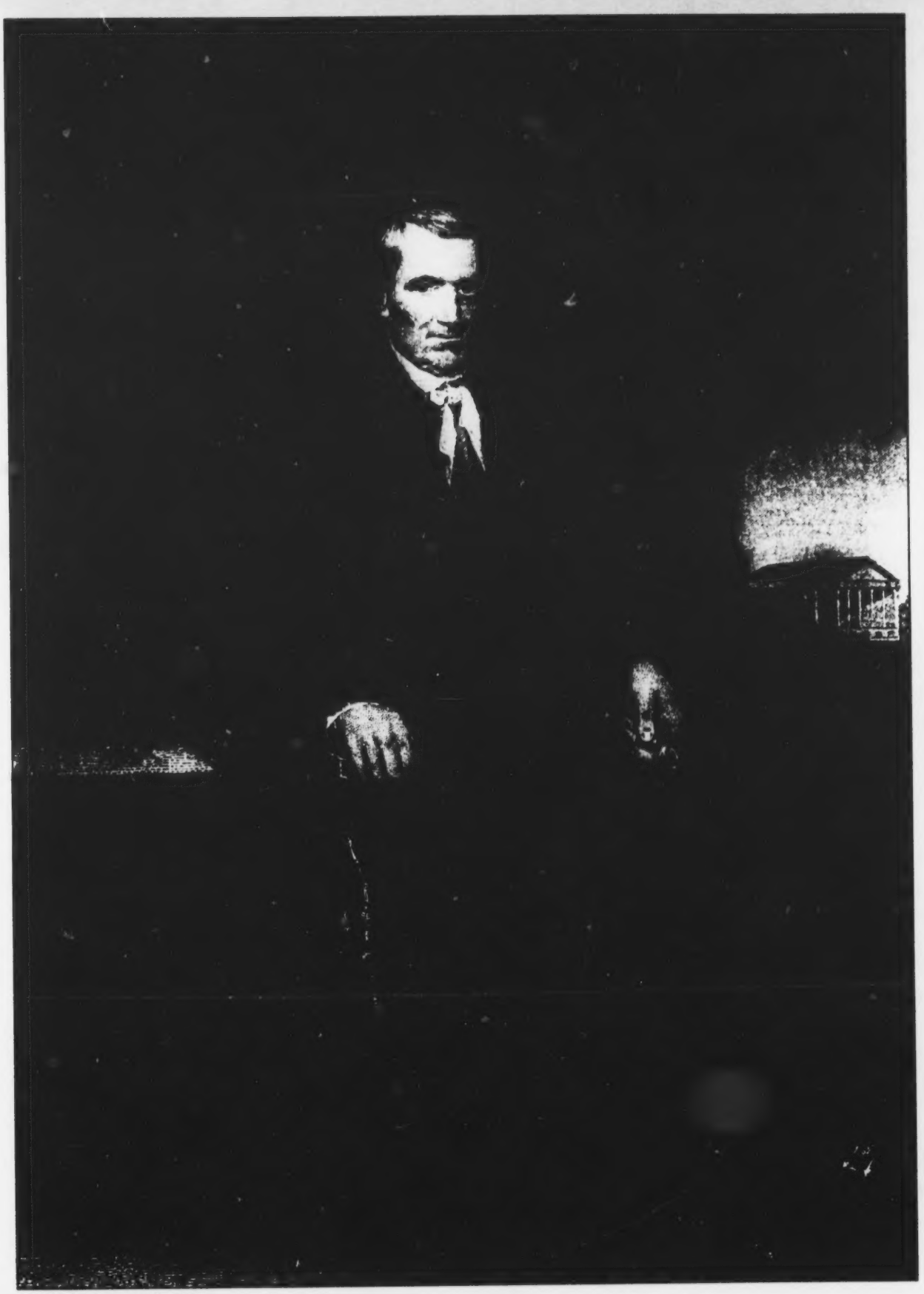
A Valediction

The 1991 celebration of the two hundredth anniversary of the Bill of Rights occurs at a time when the world is on the threshold of monumental political, social, and economic changes. The human urge for freedom is breaking out all over the world and repressive governments are under siege as their people reach for those basic rights we in this country have enjoyed for more than two hundred years.

Individual rights under our Constitution have been enlarged by amendments and protected by court decisions. The drafters of the Constitution were frank in their acknowledgement that their endeavor was an "experiment," and recognized, in a realistic way, that parts of it might not work. They knew that the success of the experiment would depend on the character and education of the people. A people indifferent to and ignorant of the challenges of free government could not be expected to sustain it.

Project '87, the Commission on the Bicentennial of the United States Constitution, and myriad other organizations have in the last decade undertaken to stimulate and revitalize education about the Constitution and the Bill of Rights. The seeds planted in millions of young minds will bear fruit in the years to come. They are part of a two-hundred-year-old effort to sustain the informed citizenry that Washington, Madison and others saw as imperative to successful self-government. That challenge is our heritage. We hope that our legacy will be to have helped shape a people prepared to meet the challenges that Ben Franklin had in mind when he said the delegates at the Constitutional Convention had created "a Republic — if you can keep it."

Warren E. Burger
Chief Justice of the United States, retired
Chair, Commission on the Bicentennial of the United States Constitution
Honorary Chair, Advisory Board, Project '87



John Marshall. *Library of Congress.*

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Constitutional Power To Enforce Individual Rights: The Legacy of *McCulloch* v. *Maryland*

by J. WOODFORD HOWARD, JR.

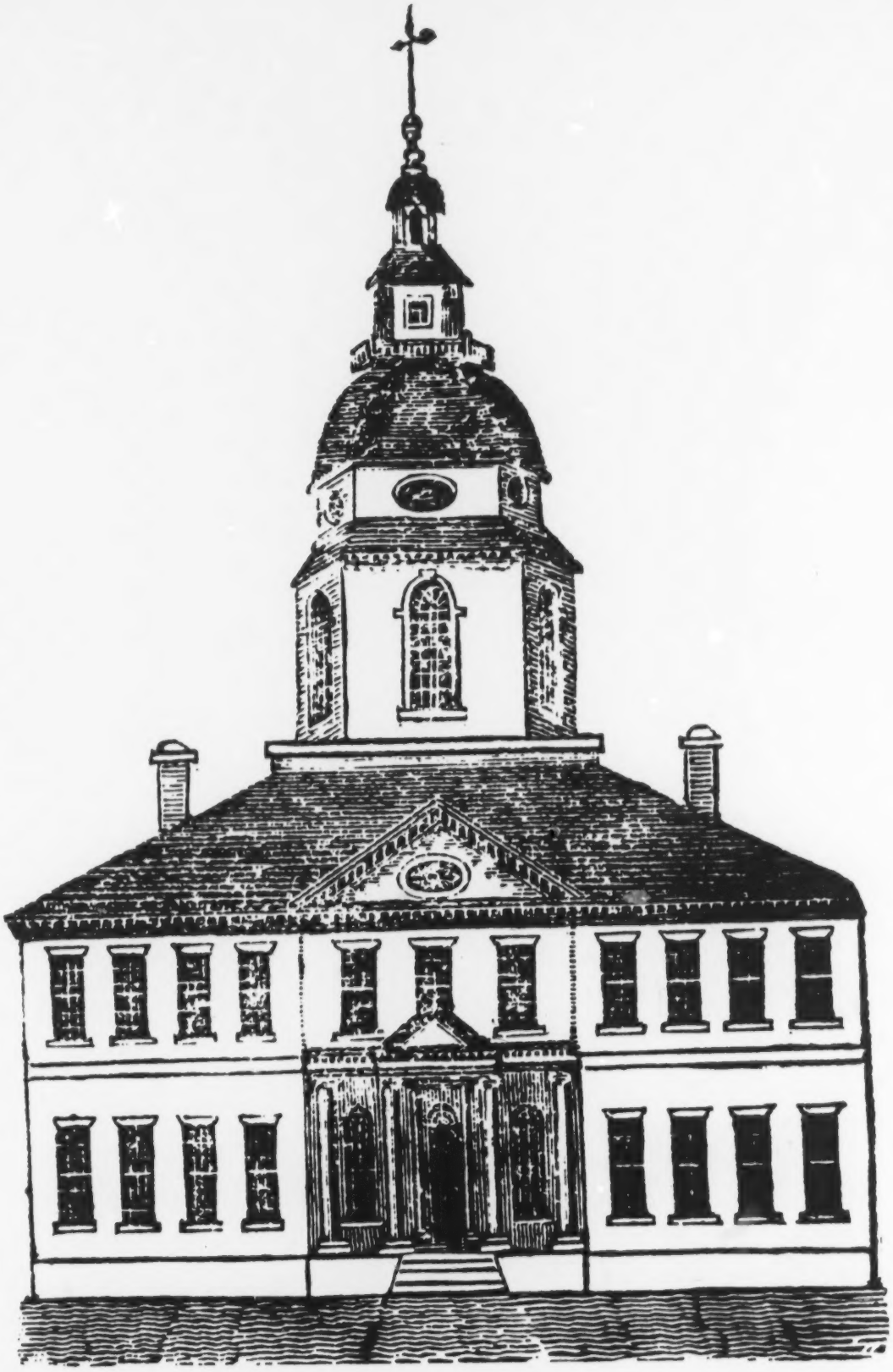
The Bill of Rights of 1791 made explicit that the U.S. Constitution did not abrogate basic rights of individuals. The Bill of Rights, however, limited *only* the national government. The Fourteenth Amendment of 1868 potentially extended these guarantees to limit actions by state and local governments, a potential largely realized by the late 1960s. Even then, expanded protection of federal rights depended heavily on a prior philosophy of national power and judicial review developed by John Marshall in 1819 in a case known as *McCulloch* v. *Maryland*. Although the Supreme Court wavered for over a century between fidelity to this philosophy and an opposing ideology of states' rights, Chief Justice Marshall's opinion for the Court in that celebrated case would be the hardest for modern Americans to live without. Its principles of national power and supremacy sustain both the welfare state and federal protection of individual rights. Its concepts of the organic Constitution and judicial review are cornerstones of American constitutional law. In celebrating our great charter of personal freedoms, we do well to remember that the Constitution of enumerated powers underpins enforcement of the Bill of Rights.

Political representation is the core mechanism of republican government. A written constitution, separation of powers, federalism, judicial review, and personal rights are all auxiliary controls to protect minorities and individuals from overweening majorities. The *McCulloch* precedent has few rivals in illuminating the interplay of representation with institutional powers and individual rights—indeed, of politics and law—in our continuing quest for a republican empire of liberty and equality. The case, rising from Baltimore amid a financial panic, challenged the constitutionality of both the second Bank of the United States and a state tax on the bank. All sides treated the dispute as a showdown for longstanding quarrels over the nature of Union, the role of federal courts, and economic policy in the burgeoning young republic. Beyond banking and taxation, the case had important ramifications for the constitutionality of the national program of internal improvements. Profound, too, were the implications for slavery in federal territories, an issue then roiling into crisis in Missouri. Because liberty meant largely freedom from government restraint, the ostensible conflict over federalism in *McCulloch* deeply affected economic liberty and whose vision of it would prevail.

The Constitution neither grants Congress express power to charter banks or corporations nor forbids state taxes on federal agencies. Congress had chartered a Bank of the United States in 1791, provoking a fateful split between the Federalist Alexander Hamilton, who favored it, and the Republican Thomas Jefferson, who believed it unconstitutional. After this charter lapsed, a Republican Congress chartered a second Bank of the United States in 1816 with little fuss. Even Jefferson supported it.

The second national bank soon became a center of controversy. Despite its name, the institution was largely a private commercial enterprise. The U.S. government owned 20 percent of its stock, appointed 5 of its 25 directors, and used it as a depository for federal funds. In the absence of U.S. paper money, notes issued by the bank and state-chartered private banks competed as media of exchange. Corruption and overextension of credit, as in the savings and loan industry today, ailed poorly managed banks at both levels. Federalists, large commercial interests, and supporters of economic mercantilism championed a national bank and a uniform currency as essential for economic growth and stability. States' righters, agrarian debtors, and local banking interests denounced them as oppressive instruments of Northern and British capital. Antibank feelings ran high in 1818 after the institution called in its loans, overextended state banks failed, and a severe depression ensued. Marylanders, who had suffered large losses when the corrupt Baltimore branch of the national bank collapsed somewhat earlier, joined seven states in passing legislation to protect themselves from what they regarded as a burdensome "money trust," federal in name only. Maryland's requirement that banks not chartered by the state must pay a tax on their notes was aimed solely at the Bank of the United States. After James William McCulloch, unsavory cashier of the revived Baltimore branch, issued notes without paying the tax, Maryland obtained penalties in its courts and McCulloch appealed to the U.S. Supreme Court.

Both sides accepted the high tribunal's jurisdiction to settle the great test case. Eminent advocates—U.S. Attorney General William Wirt, Daniel Webster, and William Pinkney for the bank versus state Attorney General Luther Martin, Joseph Hopkinson, and Walter Jones for Maryland—argued for nine days in "a splendor of eloquence" before the Justices. There were three central questions: (1) Can Congress incorporate a bank without express authorization in the Constitution? (2) Can a state tax the operations of a federal instrumentality? (3) Who decides—state, Congress, or Court?



The State House at Annapolis. *Courtesy of the Maryland State Archives.*

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The Constitution is an instrument of the sovereign people, not a compact of states. From that premise, Marshall expounded with powerful logic basic principles of our "living" Constitution and their relationships in practice.

As expected, the Justices unanimously validated the bank and voided the tax. What made Chief Justice Marshall's opinion so significant were the theories of Union and the judicial function he advanced to justify the decisions and the Court's active role in upholding national supremacy over the states. He opened with solemn warnings against fanning political hostilities and unsettling "immense property" unless disinterested judges resolved the dispute. Then he cut to the jugular. The Constitution is an instrument of the sovereign people, not a compact of states. From that premise, he expounded with powerful logic basic principles of our "living" Constitution and their relationships in practice. Because the Framers relied more on allocating powers than defining rights to restrain government, these principles would become pivotal to national protection of civil rights.

Broad Implied Powers

Best known is broad implied powers. Maryland conceded that the "necessary and proper" clause of Article I, §8, granted Congress extra authority or choice of means to implement its enumerated powers; the Tenth Amendment was merely declaratory of that principle. The real issue was the scope or degree of these so-called implied powers. The *McCulloch* argument was essentially a replay of the great debate between Hamilton and Jefferson over "loose" versus "strict" construction of Congress' auxiliary powers, which had occurred over the first national bank in Washington's administration. Maryland's lawyers advanced Jefferson's minimalist view that the necessary and proper clause *limited* implied powers to "absolutely necessary" means, lest Congress invade reserved state powers and individual rights. The implicit remedies were close judicial scrutiny of congressional methods, state resistance, or frequent resort to the people by constitutional amendments. Instead, the Court embraced Hamilton's maximalist view that the people *granted* Congress broad incidental authority to execute its enumerated powers, unrestrained by states or courts.

Marshall employed standard methods of interpretation—text, intention, history, structure, and practical consequences—to support this conclusion. He argued that the absence of the restrictive language "absolutely necessary" in the necessary and proper clause, in contrast to its presence in Article I, §10 regarding state duties on imports, signified the Framers' intent to grant Congress flexible implied powers. So did their refusal to reserve all powers not *expressly* delegated to the United States in the Tenth Amendment, which he construed as a toothless redundancy intended to calm popular fears.

Text figured less in his interpretation than constitutional architecture and republican principles. Basing implied powers more on the whole instrument than on the necessary and proper clause, he contended that the Constitution must contain a "vast mass of incidental powers" commensurate with its "great outlines" and objects, "if that instrument be not a splendid bauble." Invoking separation of powers, he restricted judicial review over legislative choice of means. The Court concededly had a "painful duty" to nullify laws expressly prohibited by the Constitution or unauthorized ends masquerading as means. But the main problem—the degree of necessity justifying Congress' selection of measures—he said, "is to be discussed in another place," meaning Congress itself. "Let the end be legitimate, let it be within the scope of the constitution," the Chief Justice concluded in an oft-quoted passage, then "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." In short, the scope of Congress' implied power is largely a political question. By endorsing broad choice of means and restricting judicial review of them, the Court thus legitimated a vast reservoir of national authority and left division of state and national powers essentially to Congress, President, and voters.

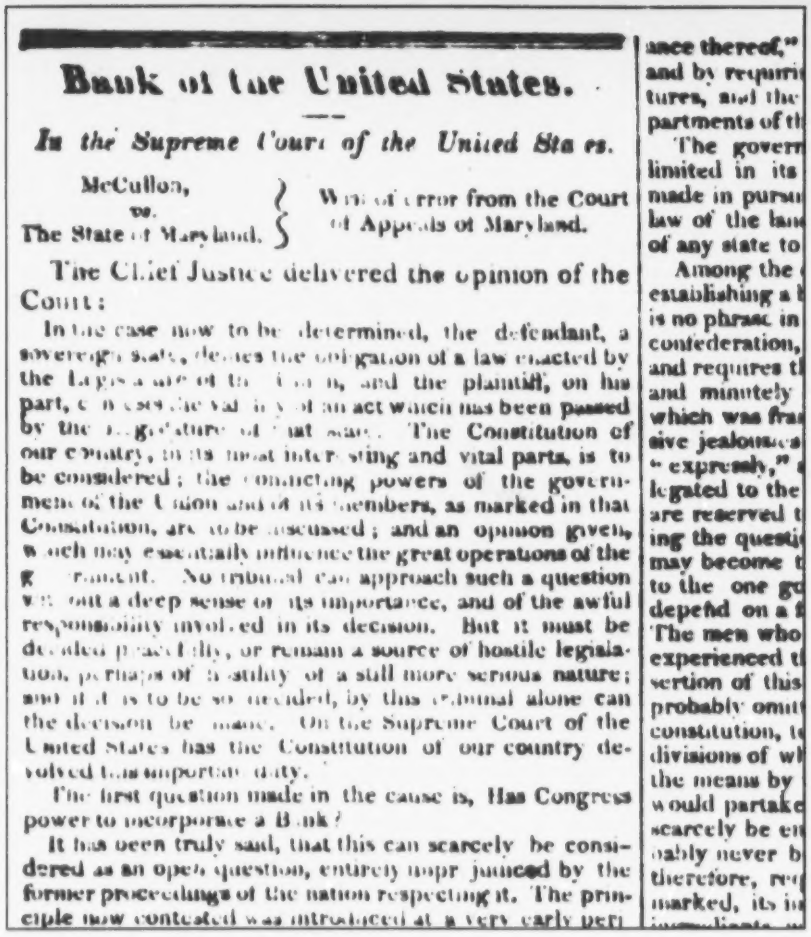
A 'Question of Supremacy'

Then the Court claimed power to enforce this flexible system on the states in the silence of Congress. The tax-exemption issue evoked two principles of American federalism: national supremacy and a supplementary role of federal courts as guardians of national interests and federal rights. Federalism was a "cardinal question" during the republic's first 150 years. Individuals and corporations often invoked it to escape government regulation. For all the great magnitude of the problem of "clashing sovereignty," Marshall believed that the supremacy clause in Article VI of its own force offered a simple solution: namely *preemption*. That is, federal courts would strike down state poaching on any national power without waiting for Congress to act. To reach this conclusion, Marshall assumed that federal judicial power vis-à-vis the states was coterminous with Congress' under the supremacy clause. He presumed state hostility to national authority (but not the reverse) without considering the

abundant facts of the case. Maryland's plea to trust states not to abuse their concurrent powers of taxation evoked his famous dictum: "the power to tax involves the power to destroy." Ergo, state taxes on U.S. operations must fall. It was "a question of supremacy" of the whole over the parts.

Adding salt to the wound, he declared in another unnecessary dictum that Congress could tax state banks. Why the difference? If taxing power was so threatening, why did sovereign states not enjoy the same immunity? Marshall's answer, linking law to politics, endures. The federal government enjoys greater immunity, because all the people of the states are represented in making its laws, whereas the whole people are not represented in the states. In principle, powers "given by all for the benefit of all ... should be subjected to that government only which belongs to all." In practice, states had little to fear from Congress. The role of states in the composition and selection of the national government provided ample security against oppressive federal taxation. U.S. Senators and Representatives, answerable to constituents, would safeguard state interests politically. By contrast, neither national interests nor other states are represented in any state or local assembly. Here then lay the Supreme Court's job—enforcing national laws in the states when Congress and the President speak; defending national interests and federal rights from states when Congress and the President are silent. Far from being undemocratic, judges support and supplement the national political process.

This theme of reinforcing political representation in *McCulloch* became vital for enforcement of the Bill of Rights in the twentieth century. It articulated a supporting role



Bank of the United States.

In the Supreme Court of the United States.

McCulloh, vs. The State of Maryland. } Writ of error from the Court of Appeals of Maryland.

The Chief Justice delivered the opinion of the Court:

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the Legislature of the Union, and the plaintiff, on his part, denies the validity of an act which has been passed by the Legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is, Has Congress power to incorporate a Bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early peri

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McCulloh [sic] vs. The State of Maryland. *Library of Congress.*

for judges, authorized in Articles III and VI, that became fixed in our constitutional scheme. The primary mission of the federal judiciary today is enforcing the supremacy and uniformity of national law and federal rights of individuals in the states. Policing separation of powers is secondary. Hence, textbook pablum that the Supreme Court is the "umpire of federalism" is no longer true. The Court, as in Marshall's time, is a ballplayer on the national team. Backstopping political controls and protecting human rights in a federal republic have become its central tasks.

Marshall touted preemption as safe for the states, the Union, and the Court. Deference to the national political process, he suggested, would relieve judges from arbitrating "clashing sovereignty" and from the "perplexing inquiry, so unfit for the judicial department," of determining the reasonableness of state taxation. In fact, he provoked a storm. The very clarity of his nationalistic vision—maximum national power over states, minimum judicial scrutiny over Congress—so agitated opponents that the *McCulloch* case became a major turning point in continuing struggles over the nation's experiment in divided sovereignty. The Court itself became deeply embroiled in issues of national judicial power and states' rights. Ohio continued to tax the bank. Other states challenged the tribunal's supremacy over their judiciaries in interpreting the U.S. Constitution under §25 of the Judiciary Act, a challenge which culminated in Marshall's masterful defense of national supremacy over state supreme courts in interpreting federal law in *Cohens* v. *Virginia* (1821).

It is important to understand why *McCulloch* was so provocative. John Marshall was a Federalist chief justice in Republican times. Though few statesmen seriously opposed the bank's constitutionality by 1818, his activist doctrine,

This theme of reinforcing political representation in McCulloch *became vital for enforcement of the Bill of Rights in the twentieth century.*

reaching far beyond what was necessary to decide the case, struck many Americans as part of a partisan Federalist campaign to achieve through courts a consolidated central government that had been spurned at the Philadelphia Convention and at the polls. In the Virginia Plan, rejected at Philadelphia, Congress would have determined the scope of its own powers, subject to review by a Council of Revision consisting of the President and the Justices. The Framers compromised by enumerating, dividing, and reserving powers. During debates over the Constitution and the Bill of Rights, Anti-Federalists had charged that a central government of enumerated *and* implied powers could become a consolidated government of indefinite authority for the benefit of upper classes. Supporters of these instruments like James Madison stoutly denied this possibility, though Jefferson, wary of containing enumerated powers once implied power was granted, urged Madison to support a Bill of Rights as a useful check.

The *McCulloch* decision, linking Articles I, III, and VI, revived fears that implied powers would swallow up the principle of enumeration. Distinctions between ends and means can be fuzzy. National authority seemed boundless, moreover, when broad implied power and preemption were coupled with Marshall's simultaneous reduction of state power over vested property rights under the contract clause in the Dartmouth College Case and his expansive interpretation of Congress' plenary power over interstate commerce in *Gibbons* v. *Ogden* (1824). What would stop the national government from reducing states to provinces? If Federalist jurists were not conspiring to revive the Virginia Plan and economic mercantilism, the Marshall Court's great nationalist decisions in *Martin* v. *Hunter's Lessee* (1816), *McCulloch*, and *Gibbons* appeared to centralize the Constitution far more than the compromises reached at its framing.

Hardening Sectional Conflict

These cases shook the trust of agrarians and slaveholders in constitutional limits to protect their interests. As battle-lines formed over exclusion of slavery in the Missouri Territory, Southerners pondered: Could Congress ban slavery in new states under the commerce clause if they lost control of the Senate? Marshall offered them scant protection via separation of powers, bicameralism, or judicial review. Apart from political checks, states' rights were their only hope. *McCulloch* especially crushed the South's faith in the Court. As sectionalist conflict hardened, heretofore muted attacks on judicial supremacy and subjectivity reached full flower. Jefferson was a potent critic. "The most dangerous branch" was a "worm," fumed the sage of Monticello, "sapping by little and little the foundations of the Constitution."

The *McCulloch* decision thus was to the nineteenth century what *Brown* v. *Board of Education* was to the twentieth: a symbolic watershed in clashing conceptions of the Constitution and the proper judicial role. So strong was the reaction that Marshall, answering critics in Philadelphia and Alexandria newspapers under pseudonym, denied having withdrawn judicial supervision of Congress' implied power. Other cases which extended judicial protection to state taxing and police powers also demonstrated that the pragmatic Chief Justice respected the need for state authority. In *Barron* v. *Baltimore* (1833), for instance, he ruled that the federal Bill of Rights did not apply to states; and in *Gibbons* he recognized an "immense mass" of state police powers to regulate public health, transportation, and internal commerce in an era when states rather than nation did most of the governing. Because Congress left most powers unused, the centralizing implications of his nationalism for federal regulation of subjects traditionally governed by states were little felt until the twentieth century. Preserving the Union's dormant authority from dissolution in a period of strong localism and rampant growth was his goal.

In its own time, nonetheless, the *McCulloch* decision succeeded more in galvanizing opposition to its principles than in settling conflicts over tax immunities or bonding the Union. States' rights advocates developed a rival theory, known as "dual federalism," which Marshall's successors embraced more or less for the next century. According to this theory, the Constitution was a compact of states which assigned central and state governments to fixed and mutually exclusive spheres of sovereignty. The Supreme Court became the umpire to keep mutually hostile governments within their allotted domains. Individual rights were mainly the province of states. The Court so held for blacks in *Dred Scott* v. *Sandford* (1857), its first decision to void an act of Congress for violating the federal Bill of Rights, and continued to hold for decades after the Civil War. In cases that gutted national civil rights laws and immunized state agents from federal taxes, the justices put Marshall's philosophy on the shelf.

Two official theories of Union and judicial power thus vied for allegiance well into the twentieth

Federal power increasingly has shifted from an adversary to an agent of freedom and the Constitution's unfinished agenda of equality.

century. Both in their own time insulated private property from public regulation. And both carried to their logical extremes seemed to convert the Constitution into something different from the bargains struck by the Framers. Just as Marshall's system conjured up a unitary republic of boundless power checked politically, so dual federalism yielded something less: a federation of expressly enumerated reserved powers for states and judicial supremacy over federal-state relations. Critics of both theories attacked the justices for subjectivity, partisanship, and vaulting Court over Constitution.

Dual federalism so paralyzed national capacity to handle the slavery crisis and the Great Depression, however, that the pendulum swung back to Marshall's jurisprudence in our time. After the great Court-packing fight of 1937, the principles of *McCulloch* became cornerstones of public policy. Broad enumerated and implied powers to tax and regulate interstate commerce support national regulation of the economy, the environment, public accommodations, social security, the workplace, and even drinking ages on highways. Tax immunities, in turn, have withered under mutual needs for revenue and Justice Holmes' realistic approach: "The power to tax is not the power to destroy while this court sits." Coercion through taxation must be proved, not presumed.

Marshall's Philosophy Governs Today

Marshall's philosophy—leave it to Congress and political restraints—governs federalism today. While generalizations are hazardous in view of close majorities in the key cases, *Garcia* v. *San Antonio Metropolitan Authority* (1985) and *South Carolina* v. *Baker* (1988), the Court's recent attitude toward federal-state relations can be summarized in three principles.

(1) National "power is as broad as the need that evokes it." The Tenth Amendment is "but a truism."

(2) Except for express prohibitions of the Constitution, judges should exercise minimum scrutiny over exercise of Congress' plenary and implied powers.

(3) "Minimum scrutiny" means judicial deference to rational decisions reached by the national political process.

Subject matter no longer defines the constitutional distribution of federal and state powers. The theory is that the supremacy clause protects federal authority whereas political representation protects states. Consequently, the Court has returned substantially to the Virginia Plan. Congress is the judge of its own powers. The scope of its authority is a political question. The remedy for unwise legislation is the ballot box. The only exceptions are express prohibitions of the Constitution or federal overreaching caused by "extraordinary defects in the national political process." Because the Justices defer similarly to congressional enforcement of individual rights guaranteed by the Civil War Amendments, some observers now view constitutional federalism in the land of its birth as dead. Just when Germany and other countries emerging from authoritarianism adapt judicially enforced federalism to defend against tyranny by centralized government, the United States is evolving toward a unitary state restrained chiefly by political controls and judicially enforced rights of individuals.

John Marshall recognized in *McCulloch* that "the question respecting the extent of the powers actually granted [to Congress], is perpetually arising, and will probably continue to arise, as long as our system shall exist." After all, both the boundaries of federal-state authority and relations between the national government and individuals depend substantially on their scope. Whatever the outcome of current disputes, the American covenant has evolved into a Constitution of great powers and human rights. And national authority is crucial in protecting personal guarantees.

This evolution reflects changing conceptions of liberty and its enforcement. The Civil War transformed older ideas of liberty *against* government into liberty *through* government. Federal power increasingly has shifted from an adversary to an agent of freedom and the Constitution's unfinished agenda of equality. This transformation rests on several legal foundations. Three Civil War Amendments not only expanded personal rights protected against state action but granted Congress enforcement powers whose scope is now considered equivalent to implied powers in Article I. After the 1930s, the Supreme Court gradually nationalized most of the Bill of Rights against all state and local governments by absorbing these guarantees into the due process clause of the Fourteenth Amendment. These decisions greatly enlarged the jurisdiction of courts across the land to defend constitutional rights.

Marshall's philosophy of national power and judicial review in *McCulloch* also left important legacies. The Civil Rights Act of 1964 and the Voting Rights Act of 1982 are potent examples of expansive implied powers. Deferential justices upheld sweeping national measures to forbid private discrimi-

nation and to reform electoral systems. Marshall's most original idea—courts as supplements to political participation—is very influential. Marshall developed this concept for federalism. The high court extended it to individual rights of the first Ten and the Fourteenth Amendments in a footnote in *United States* v. *Carolene Products Co.* (1938).

The general principle of this famous footnote is that judges should defer to rational commercial legislation but intervene to preserve the democratic political process and fundamental rights of minorities. To reinforce representation, Justice Harlan F. Stone specifically suggested "more exacting judicial scrutiny" of (1) laws restricting "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," including voting, communication, and assembly; and, citing *McCulloch*, (2) laws or prejudice directed at "discrete and insular" minorities—religious, national, racial—that are politically powerless. Reapportionment, school prayer, and desegregation decisions are leading applications of this concept. Because the same approach applies to federalism after *Garcia* and separation of powers as well, John Hart Ely regards "representation reinforcement" as perhaps the reigning strategy of the judicial function in constitutional law today.

Special Guardians of Individual Rights

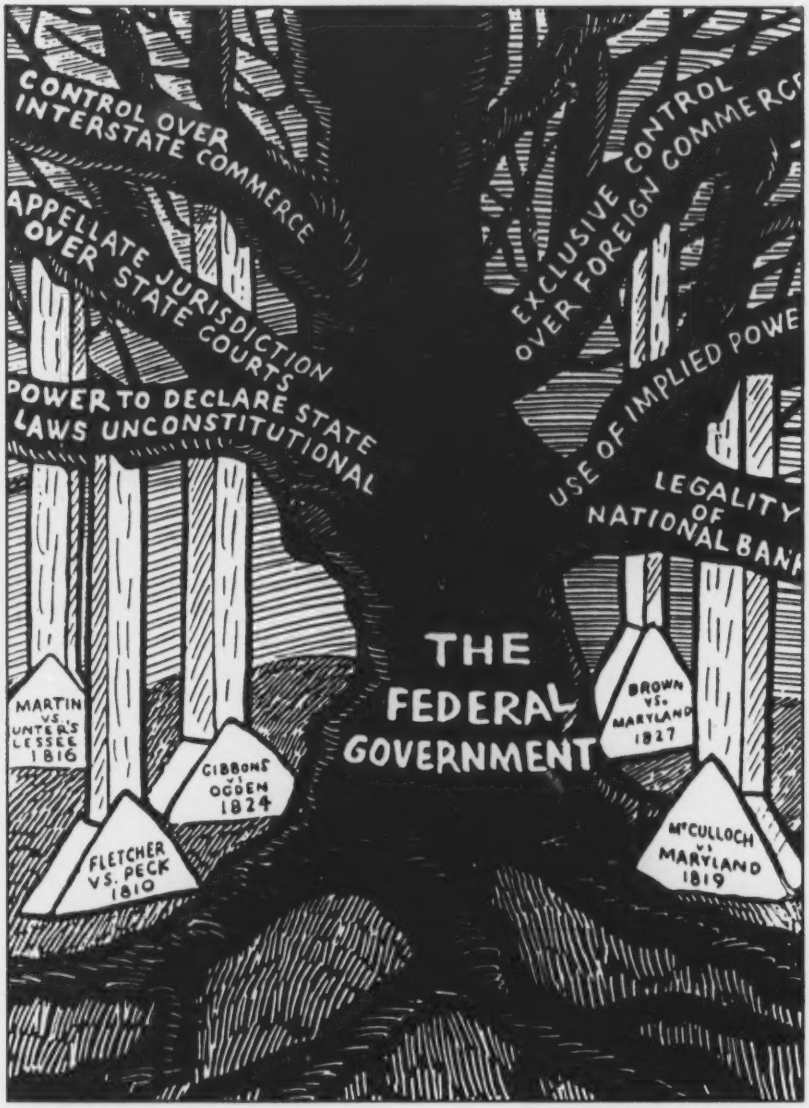
Beyond *Carolene*, the Warren Court heightened judicial scrutiny for political speech, religious expression, and racial discrimination. The Burger Court constitutionalized unwritten rights of privacy. All these developments, as Justice William J. Brennan declared triumphantly in 1986, "transformed the basic structure of constitutional safeguards for individual political and civil liberties in this nation and profoundly altered the character of the Federal system." Courts became special guardians of individual rights, making more equal in law the less equal in life. Activist jurists became motors rather than brakes of the body politic, inspiring a backlash against an "imperial judiciary" in the Nixon-Reagan-Bush years that is still unfolding. Even so, on the world stage the U.S. Supreme Court remains the prototype for constitutional courts of human rights, if not adjudication as an instrument of reform. Ironically, reasoning that Marshall advanced to shield largely dormant powers of Congress and "immense property" from Maryland populists is now a leading formula to reconcile judicial review with representative democracy.

The foremost legacy of *McCulloch* are the ideas of a living Constitution and judicial review. Jefferson championed strict construction of delegated powers and constitutional change by frequent amendment, a political process even Madison thought destabilizing. Marshall favored loose construction of national powers and constitutional change by elected federal officials subject to judicial review. He legitimated this approach in *McCulloch* and allied cases by coupling two Federalist themes: the written Constitution embodies popular sovereignty and judging is objective.

"We must never forget, that it is *a constitution* we are expounding," Marshall asserted, not a municipal code. The Constitution was an original compact of the sovereign people, "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." The great outline requires ample powers and discretion over particulars and unforseen circumstances. Otherwise, the instrument would be prolix, misunderstood, and short-lived, like many state and foreign charters. A flexible covenant requires interpretation. All officials may adapt and interpret it, but only an independent and impartial judiciary, possessing "neither FORCE nor WILL but merely judgment," is capable of deciding authoritatively in proper cases whether those decisions accord with reason and the people's written will. Far from vaulting Court over Constitution, judges enforce the Constitution over all. Once accepted, Marshall's premises of Union and judicial review led inexorably to the Supreme Court's primacy in interpreting the Constitution and laid the foundations of American constitutional law.

Despite John Randolph's lament—"wrong, wrong, all wrong, and not a man alive can say why"—Marshall's argument is open to challenge. Did the Framers intend their bundle of compromises to endure forever? Washington doubted it would last. Jefferson opposed Marshall's theories for implying rule by judges or "rule from the grave." An elastic Constitution and objective interpretation are ideas in tension. Undaunted, Marshall wove constitutional theory, text, and structure into a mythic reconstruction of the revolutionary past that reflected the premises of his party and yet enabled succeeding generations to govern according to theirs.

The critical innovation is the judicial method of enforcing constitutional limits. The Bill of Rights is more than a statement of first principles, protected politically; it is organic *law* enforceable in ordinary courts. We often forget how long it took to solidify this practice. Marshall asserted it tentatively against


CONTROL OVER INTERSTATE COMMERCE
APPELLATE JURISDICTION OVER STATE COURTS
POWER TO DECLARE STATE LAWS UNCONSTITUTIONAL
EXCLUSIVE CONTROL OVER FOREIGN COMMERCE
USE OF IMPLIED POWE
LEGALITY OF NATIONAL BAN
THE FEDERAL GOVERNMENT
MARTIN VS. HUNTER'S LESSEE 1816
GIBBONS V. OGDEN 1824
FLETCHER VS. PECK 1810
BROWN VS. MARYLAND 1827
McCULLOCH V. MARYLAND 1819

Drawing by Philip Dorf.

national action in *Marbury* v. *Madison* (1803) but never invalidated another act of Congress. His fully matured vision in *McCulloch* and allied cases "completed *Marbury*" against state action, where "ill humors" that judges can remedy tend to concentrate. The contrasting styles of these opinions tell us much about judicial review in operation. The Court is essentially a marginal player in enforcing separation of powers. As Jefferson foresaw, most battles between elected titans in Washington are accommodated politically. The Court's basic job under *McCulloch* is to enforce federal powers and rights of individuals against the states. Despite fierce resistance to its decisions ever since, despite the roles that many other actors play in the constitutional dialogue, Americans now expect the Supreme Court to be the authoritative interpreter of the U.S. Constitution, short of amendment. As Charles Evans Hughes observed, "We live under a Constitution, but the Constitution is what the judges say it is"—"at the last time they say it," added Senator Hugo L. Black during the Court-packing imbroglio of 1937.

Judicial review thereby joins amendment, political practice, and custom as an incremental method of constitutional development. Because their decisions become constitutional law, the Justices serve as a continuous constitutional convention, mediating colliding values in lawsuits; and an organic Constitution lives as an instrument of permanent, and mostly peaceful, revolution in a world where the only constant is change. The very seesaw of *McCulloch* as precedent illustrates that constitutional interpretation in its highest reaches becomes constitutional creation, reconciling forces of continuity and change in the dynamic American community.

Thus, in a great state paper touching every dimension of constitutional limitation, John Marshall taught us how integral political representation and the Constitution's allocations of power are to safeguarding the liberties of a free people. As Justice Antonin Scalia says: The Bill of Rights "represents the fruit, and not the roots of our constitutional tree."

Suggested additional reading:

Paul Brest and Sanford Levinson, *Processes of Constitutional Decisionmaking*, 2nd ed. (1983).

John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

R. Kent Newmyer, "John Marshall and the Southern Constitutional Tradition," in Kermit L. Hall and James W. Ely, Jr., eds., *An Uncertain Tradition: Constitutionalism and the History of the South* (1989), 105–24.

G. Edward White, *The Marshall Court and Cultural Change, 1815–35* (1988).

James Boyd White, *When Words Lose Their Meaning* (1984).

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THE NINETEENTH-CENTURY REVOLUTION IN CIVIL LIBERTIES: From "Rights in Property" to "Property in Rights"

by JAMES A. HENRETTA

Not since the era of Jacksonian Democracy (1830–1860), when the ideology of "equal rights" dominated political discourse, have Americans been so concerned with their rights and liberties as today. Contemporary concern with rights has two unique features. First, the emphasis now falls on personal liberties, rights that permit the expression of individual identity, rather than on political liberty and property rights, as in centuries past. Second, the claim for rights is no longer derived from a God-given "natural law" or the protections of the English "common law." Rather, it is usually based on one or more of the amendments to the Federal Constitution of 1787. As historian Jack K. Rakove has noted, many Americans now "regard the Bill of Rights as the essence of the Constitution."

These emphases on personal liberties and on constitutionally-guaranteed rights were foreign to most eighteenth-century Americans. Those who wrote and ratified the original state and national constitutions defined civil liberties in terms of the political power exercised by the people. Moreover, political scientist Donald Lutz has suggested, they viewed bills of rights as "the statement of broad principles rather than as a set of legally enforceable rights."

Consequently, the origins of the modern sense of civil liberties lies not in the founding period but rather in two nineteenth-century transformations within the American states. First, a major shift in constitutional thought replaced the collective "republican" political definition of civil rights with an individualistic and economic "liberal" one. Republicanism defined liberty as the ability to participate actively in government, to pursue the public good through virtuous personal conduct. Conversely, liberal individualism celebrated the self-interested pursuit of private economic advantage. It sought not to enhance the role of the state in promoting public welfare but to limit its reach. By 1860, the classical liberal definition of limited government and a laissez-faire economic philosophy had triumphed over the positive republican conception of the "commonwealth."

Second, newly powerful state judges and legal treatise-writers used liberal ideology to effect an equally important transformation in legal thought. After 1860, they used the doctrines of "liberty of contract" and "substantive due process" to protect the rights of private property from legislative control. This expansive definition of property rights in the states had an unexpected result. It laid the conceptual foundation for the protection of First Amendment and other non-economic "personal" rights by the United States Supreme Court after 1910 (and by many state courts, using state bills of rights, after 1970).

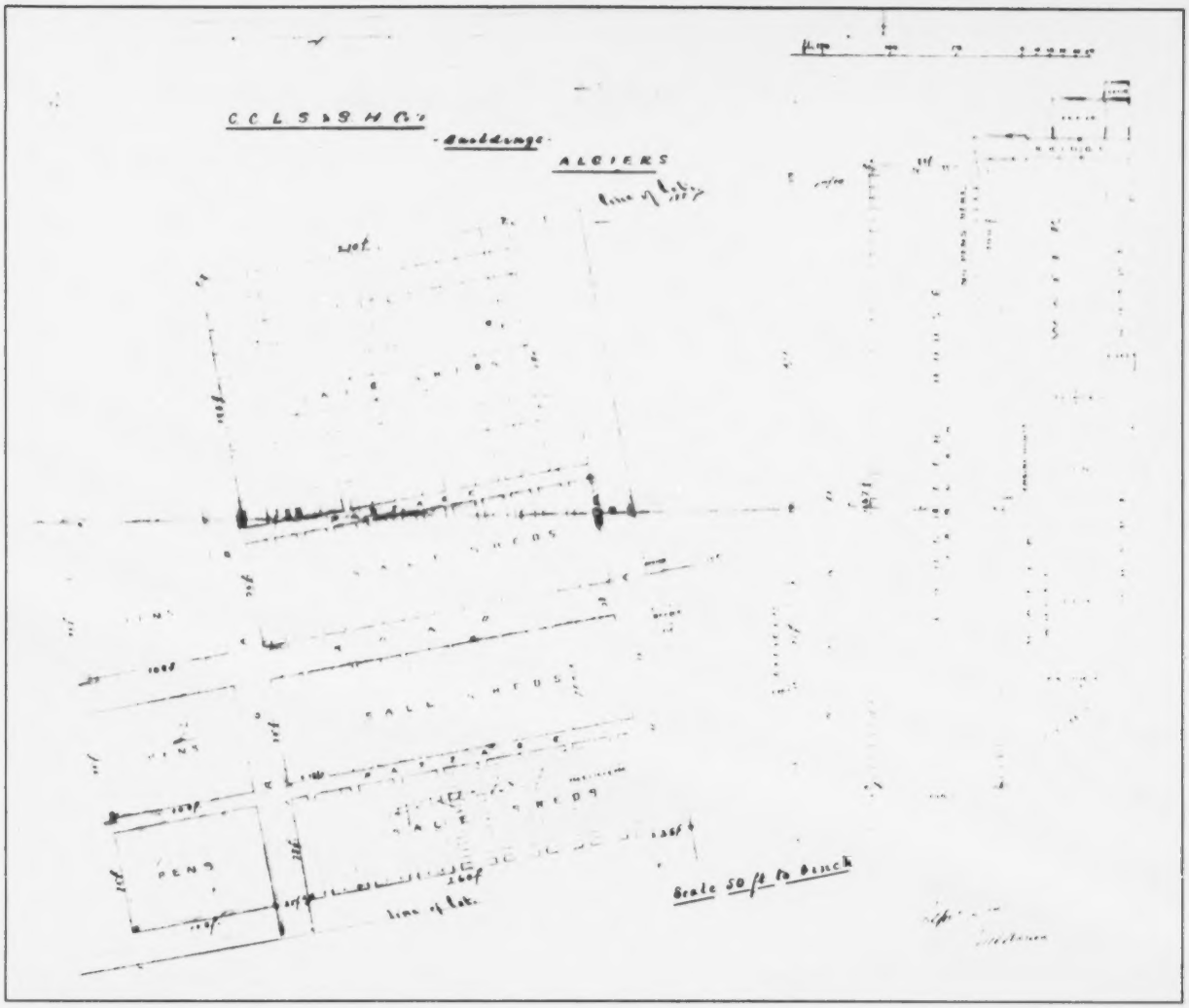
Republicanism: Property and "Civic Liberty"

The American states began as a republican polities. Declaring their freedom from monarchical government as well as British rule in 1776, they vested ultimate political authority in the people. During the War for Independence, Benjamin Hitchborn of Boston defined "civil liberty" as "a power existing in the people at large . . . to alter or annihilate both the mode and essence of any former government, and adopt a new one in its stead." This definition of republicanism as popular sovereignty took legal form in the Delaware Constitution of 1776. It solemnly declared that "the Right in the People to participate in the Legislature, is the Foundation of Liberty and of all free Government."

This idea of republicanism underlay Alexander Hamilton's argument in Federalist No. 84 that bills of rights were unnecessary in America. As "stipulations between kings and their subjects, abridgments of prerogative in favor of privilege," Hamilton maintained, bills of rights had "no application to constitutions, professedly founded upon the power of the people." Wise laws, enacted by virtuous and enlightened legislators, were protection enough for the liberties of citizens.

According to republican principles, voting was a public trust, not a universal right. Consequently, the New York Constitution of 1777 restricted voting rights to freeholders, economically independent men who could act "virtuously." The "elective suffrage was a privilege, a franchise, a civil right, and not a natural right," noted a delegate to a nineteenth-century New York constitutional convention; it was given "by all the citizens of a country to those who will exercise it best, for the common interest of all."

Republican ideology thus defined "civil liberty" as the exercise of political power and limited this right to taxpaying property owners. "Those who own the country," former United States Supreme Court Justice John Jay bluntly declared in 1810, "are the most fit persons to participate in the government of it." This principle of "no representation without taxation" remained a vital part of the American constitutional tradition well into the twentieth century, particularly on the local level. In New York, for example, the Constitution of 1846 instituted universal adult white male suffrage for state elections. Yet in 1847 the legislature enacted a general village law that restricted voting on local tax



Floor plan of the Crescent City Livestock Landing and Slaughterhouse Co., the subject of The Slaughterhouse Cases, *1873. Courtesy of the Earl K. Long Library, University of New Orleans.*

questions to property owners. In 1902, the New York Court of Appeals upheld this property qualification in *Spitzer v. Fulton*. The Court ruled that the constitutional requirement of universal male suffrage applied only to "the public affairs of the *state*" and not to (equally important) questions of local government which could be restricted to voters who were also taxpayers.

Taxpayer suffrage offered protection to property holders who feared excessive taxes if landless citizens could vote. Such fears were far from groundless. Following the Civil War, northern politicians and the Union Army forced southerners to rewrite their state constitutions. The new charters mandated full political rights for all adult males as well as expenditures for improved schooling and other social services. This new legal regime provoked apprehension and animosity from wealthy plantation owners. Propertyless black freedmen and impoverished white tenant farmers formed a substantial majority of the voting population and they used the democratic franchise to raise the level of state services—and therefore of taxes as well. "Taxation and representation are no longer to be united," bitterly proclaimed one privileged white southerner: "They who own not property are to levy taxes and make all appropriations." As a Mississippi white put it, the new state constitution amounted to "the licensing of CONFISCATION by means of taxation."

This constitutional conflict had a strong racial component in the South, but protests against similar "class legislation" occurred as well in northern cities. Urban patricians branded the policies of Irish machine politicians as "organized communism and destruction of property under the guise of taxation." To thwart the political bosses, upper-class "reformers" in New York sought legislation that would extend taxpayer suffrage from the state's towns and villages to its major cities. The important New York lawyer-reformer Dorman B. Eaton argued that "no voter has a right to participate . . . in the fixing of expenditures of which he does not pay any part." In 1877, Eaton supported an unsuccessful state constitutional amendment that would have placed municipal governance in the hands of powerful, non-partisan boards of finance. Residents of cities with 100,000 inhabitants would need $500 in property or annual rent payments of $250 to vote for board members.

In the republican world of economic rights, there was a balance between wealth and commonwealth.

For well-to-do propertyholders in the North and South alike, responsible republican government meant not democracy but rather restricted suffrage, limits on legislative power and government spending, and gerrymandering to dilute the political power of the "dangerous classes." The intellectual rationale of all these anti-democratic measures lay in the property-conscious republican tradition of "civic liberty."

Republican "Vested Rights"

Republican constitutional thought celebrated property not only as the basis of "civic liberty," but also as a right in itself. "Property ... is the fund out of which the means of protecting life and liberty are usually furnished," intoned Daniel Webster, "We have no experience that teaches us, that any other rights are safe, where property is not safe." His sometime opponent John C. Calhoun agreed completely: "Liberty, equality and freedom are all in a sense dependent on the ownership of property."

Lawyers and judges translated this rhetoric into legal dicta and constitutional doctrine. "The right of acquiring and possessing property and having it protected is one of the natural, inherent and unalienable rights of man," Supreme Court Justice William Paterson told the jury in *Van Horne's Leasee* v. *Dorrance* (1795). Likewise, Chancellor James Kent of New York declared in *Gardner* v. *Village of Newburgh* (1816) that it would be against "natural equity" and "the first principles of government" to take private property without proper compensation. Beginning from these natural law premises, state and federal jurists elaborated a variety of legal doctrines—just compensation, the will theory of contract, the irrevocable nature of state-granted charters—to protect property rights. By the mid-nineteenth century, a legal regime of "vested rights" protected private property from public expropriation and often from private competition as well.

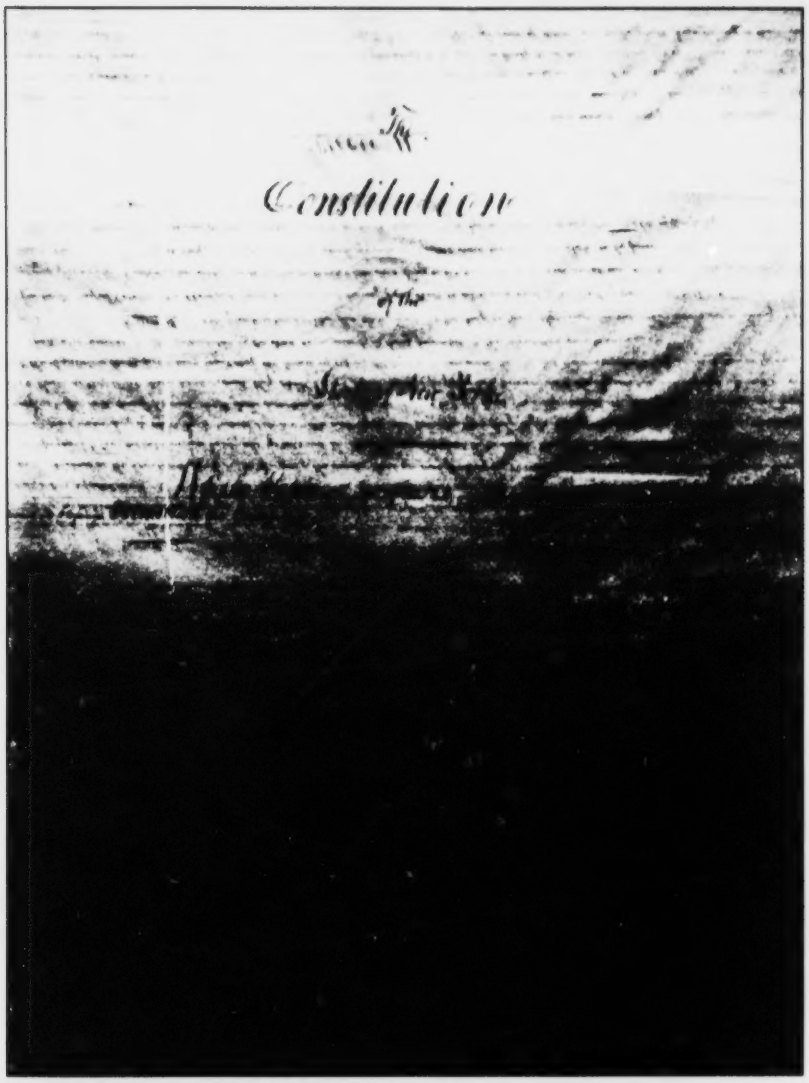
This task required considerable ingenuity. Private property rights often clashed with explicit constitutional provisions. The Vermont Constitution of 1777 asserted that: "Private property ought to be subservient to public uses, when necessity requires it." Moreover, natural and common law principles themselves often enhanced the "police power" of the state, the inherent power of government to ensure the common good. When New York authorities destroyed buildings to prevent the spread of a fire, the state's Supreme Court ruled (in 1845) that the owners were not entitled to compensation. The destruction was not a "taking" by the state; rather, it was authorized "by the law of overruling necessity." Similarly, the New York Supreme Court used the common law "nuisance" principle *sic utere tuo alienum non laedas* ("use your own property so that you do not injure another's property") to uphold a public health law that restricted burials in privately owned cemeteries and a marine law that regulated the use of private wharfs. "Every right, from an absolute ownership in property, down to a mere easement," the Court declared, "is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others."

As the great constitutional scholar Edward Corwin astutely observed long ago, the doctrines of "vested rights" and the "police power" were complementary counterprinciples. Judges used the two doctrines to "balance" the property rights of citizens with the public welfare imperatives of the state. In the republican world of economic rights, there was a balance between wealth and commonwealth.

The Liberal Challenge

The political revolution known as Jacksonian Democracy began the destruction of the republican constitutional system. The election of Andrew Jackson to the presidency in 1828 culminated a decade of popular agitation within many states for the expansion of voting rights. In the New York Constitutional Convention of 1821 various delegates had unsuccessfully advocated universal white adult male suffrage; as one delegate put it: "Our community is an association of persons—of human beings—not a partnership founded on property." Jackson rode to victory on the demands for a broader suffrage and "equal rights"; his presidency both symbolized and pushed forward a democratic conception of popular sovereignty. By the 1840s, democratic constitutionalism had become dogma in many states. Delegates to the New York Constitutional Convention of 1846 voted overwhelmingly to enfranchise "every [white] male citizen of the age of twenty-one years."

The Constitution of 1846 was a rights-conscious as well as a democratic document. Before the Jacksonian era, most state charters had rights-clauses scattered throughout the document; now constitutional conventions created a separate "bill of rights." Article I of the New York constitution specified the rights of each "member of this state," and new clauses explicitly established the rights of assembly and petition, of counsel in criminal trials in all courts, and of compensation for public takings of private property. Article I was sufficiently comprehensive that subsequent conven-



Constitution of the State of New York, 1846. *New York State Archives.*

tions—in 1867, 1894, and 1915—simply reiterated it. As one delegate summed up the guiding principles of the 1846 convention: New Yorkers were "a self-governing democratic people, all occupying the same level, all having equal wants, equal privileges, and equal rights."

Liberal Economic Rights

The principles of liberty and equality likewise informed the economic clauses in many mid-nineteenth-century state constitutions. The lawyers who dominated the New York convention of 1846 began with their own profession. To end the "monopoly" of legal practice by an elite drawn from the upper classes, the delegates opened membership in the bar to all adult males of "good moral character" and the requisite learning. They also abolished legislatively-mandated fee schedules in order to restore lawyers "to their natural rights."

Business corporations received similar treatment. The Committee on Corporations condemned the legislative grant of "special privileges" as "contrary to the great principle of equality among men." The new constitution mandated that corporations and banks could not be created by special charters but only under "general laws." Once established, however, these corporations were given some of the civil rights of individuals. In particular, they had "the right to sue and . . . be sued in all courts in like cases as natural persons." This provision enhanced the property rights of corporations by bringing them under the "due process" clause of Article I.

Taken together, these measures created a constitutional regime based on legal equality and the market place, a system which came to be known as "classical liberalism." This ideology celebrated the primacy of free-willed individuals and private contracts. In constitutional terms, it gave legally autonomous (white) males the right to vote and to enter into private contracts without legal privileges or restraints. In addition, classical liberal constitutions diminished the traditional "police powers" of state governments, the legal tools which had regulated business activities and private ventures for the good of the community as a whole. In New York, the new constitution abolished all offices for "inspecting any merchandise, produce, manufacture, or commodity whatever." "All such evidences of antiquated ignorance should be erased from the statute book," proclaimed Campbell White of New York County,

> the acuteness of the great body of the people render them perfectly capable of taking care of themselves in all the transactons of life; and we have laws to enforce the fulfillment of contracts according to their plain, obvious and honest import. That is all the interference of government that is wanted or desired.

The Liberal Legal Revolution

The mid-century constitutions in New York and other states established a regime of contractual individualism and *laissez-faire* government. However, the old republican commonwealth gave way slowly to the liberal order in the courts of law. Not until the 1870s did a new generation of judges produce a jurisprudence of economic rights that

John Forrest Dillon. *Photograph by H. J. Epler. Courtesy of the New-York Historical Society, New York City.*

completed the Jacksonian political revolution.

Thomas M. Cooley, a Michigan State Supreme Court justice, and John F. Dillon, a state judge in Iowa and then a federal judge in New York, were the leading intellectual lights of the liberal legal revolution. Cooley's famous *Treatise on the Constitutional Limitations Which Rest Upon the Power of the States of the American Union* (1st Ed., 1868) attacked the legal premises of the republican commonwealth and became one of the holy books of laissez-faire constitutionalism. Dillon's *Treatise on the Law of Municipal Corporations* (1st ed., 1872) was equally influential in curbing the powers of local governments.

Cooley and Dillon expanded the constitutional rights of taxpayers by redefining the concept of "public purpose." Traditionally, jurists had justified the state's taking of a person's property through taxation because of the "protection which government affords to his life, liberty, and the increase of the value of his possessions." Using similar reasoning, republican-oriented courts allowed the use of taxes to subsidize "public works," such as the great Erie Canal, and private enterprises, such as railroads, that promised to increase the "common-wealth" of the society. Cooley and Dillon disagreed, giving a very narrow interpretation to "public purpose." Taxes were "sacrifices for the public good," Dillon argued (citing John Stuart Mill, the great English advocate of classical liberalism), and were justified only by "political, civil, or governmental *necessity*." As Cooley put it, taxes that subsidized economic development were "an unlawful confiscation of property, unwarranted by any principle of constitutional government."

These arguments reflected the thinking of many mid-century constitutional delegates. For example, the New York Constitution of 1846 had imposed strict limits on the use of public funds. It prohibited the gift or loan of the state's credit to "any individual, association, or corporation," and required a two-thirds majority vote on legislative appropriations that assisted private enterprises.

The motives of many New York delegates—and, to some extent, of Cooley and Dillon as well—were democratic. They wanted to extend the traditional constitutional protections for "vested rights" to every taxpayer, for they had watched wealthy corporations use corrupt practices to extract financial aid from state legislatures. "When the State once enters upon the business of subsidies," Cooley declared in *People* v. *Salem* (1870), "we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger."

Railroads offered the most notorious example of private corporations using public funds for their own ends, and most state courts continued to invoke precedents from the republican era to approve such subsidies. However, many judges now invalidated governmental financial assistance to other private businesses. Cooley's and Dillon's views found even greater favor among delegates to constitutional conventions and the people at large. Nine state constitutions that were enacted or amended between 1876 and 1912 declared that: "All taxes shall be levied and collected for public purposes only."

This taxpayer revolt completed the liberal legal revolution. Before 1850, republican judges had protected private economic rights. Now liberal jurists had given similar safeguards to the public against taxes or bond payments that benefited them only indirectly, if at all. Wealthy individuals and corporations also used laissez-faire constitutionalism to protect their property interests, but the new doctrine of "public use" was inherently more democratic than the old ideology of vested rights. It claimed constitutionally protected economic rights for all taxpayers.

Indeed, the theory of "implied limitations" on legislative power used by Cooley and Dillon rested on the Bill of Rights. In their view, freedom from taxes that subsidized private enterprises was one of the "unenumerated rights" retained by the people according to the Ninth Amendment to the United States Constitution and similar clauses in twenty-six state bills of rights[1]. This theory detached the rights of private property from their origins in republican constitutional theory and transformed them into liberal democratic "public rights."

From "Rights in Property" to "Property in Rights"

The liberal legal revolution also caused a subtle shift in the conception of property. The emphasis changed from constitutional protection for "property" (owned by individuals) to the legal rights of "individuals" (who owned property). This personalization of proper-

ty rights took shape in two lines of court decisions. First, the United States Supreme Court ruled, in *Boyd* v. *United States* (1886), that an individual's right to protection against self-incrimination under the Fifth Amendment extended to personal papers. Moreover, it excluded the use of private documents as evidence at trial even if they had been subpoenaed and seized under a legal warrant meeting all Fourth Amendment ("search and seizure") requirements, a sharp departure from common law doctrine.

This linkage of personhood and property in *Boyd*—that an individual's books and papers were private property and that "the personal security of the citizen" guaranteed by the Fourth and Fifth Amendments demanded that they be as inviolate as her or his person—laid an important theoretical basis for the expansion of personal liberties in the twentieth century. In *Weeks* v. *United States* (1914), the Supreme Court articulated the "exclusionary rule," forbidding the federal government to use illegally seized "letters and private documents" as evidence at trial. In *Olmstead* v. *United States* (1928), Justice Louis D. Brandeis tried unsuccessfully to extend this exclusion to evidence secured by wire-tapping, invoking the logic in *Boyd* to protect the defendant's property right (in a private telephone line). The *Boyd* decision, Brandeis declared in this famous dissenting opinion, "will be remembered so long as civil liberty lives in the United States." Eventually the Court agreed, upholding personal privacy against electronic surveillance in *Silverman* v. *United States* in 1961.

A second line of court decisions, dealing with common law doctrines of competition and liberty of contract, likewise effected a new synthesis between property rights and individual liberties. In a liberal market economy based on private contracts, property per se had a lower legal priority than the individual's actions in producing it. "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit," the Massachusetts Supreme Judicial Court wrote in 1871, but

> he has no right to be protected against competition. . . . If disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria* [injury without legal redress].

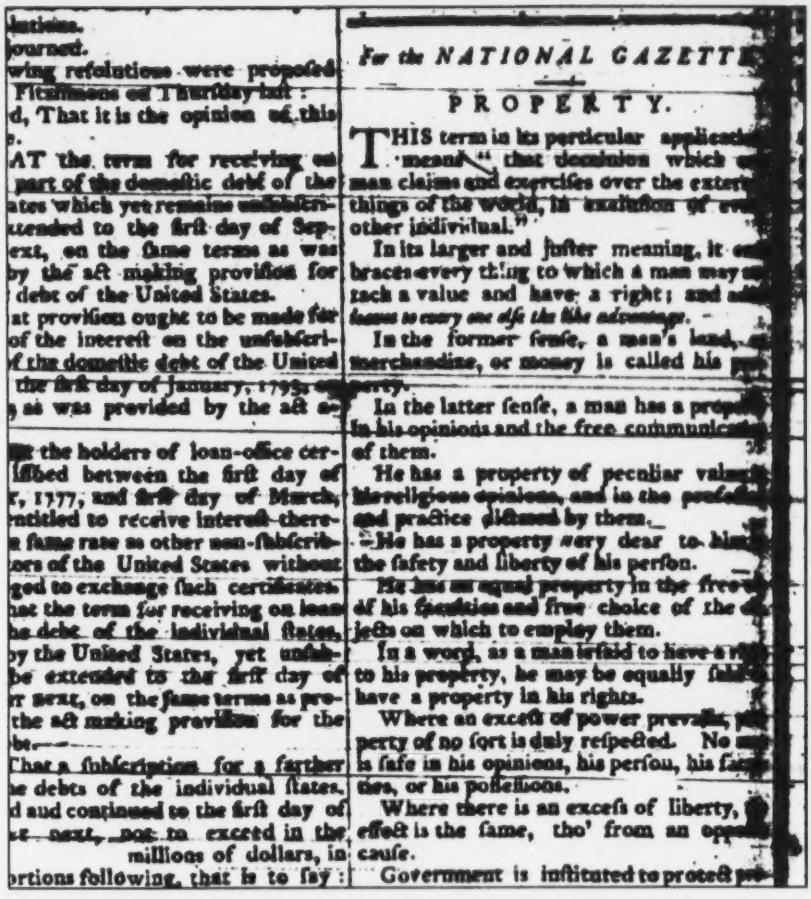
A storekeeper could reduce prices and lawfully drive his competitors out of business, Chief Justice Alton B. Parker of the New York Court of Appeals reiterated in 1902, since "free competition is worth more to society than its costs, and . . . on this ground, the infliction of damages is privileged."

The constitutional celebration of individuals as free economic agents reached its apogee in the "liberty of contract" cases. These cases have a dual importance. First, they symbolize judicial activism and the newly contrived doctrine of "substantive due process." To uphold the property rights of businesses against legislative intrusions, state and federal judges transformed the traditional "procedural" right to the due process of a fair criminal trial into a "substantive" economic test; they voided statutes that, in their minds, unfairly deprived a person or a corporation of property rights. (The activist judges of the Warren Court of the 1950s and 1960s would similarly use the doctrine of "substantive equal protection" to enhance personal rights.) Second, these cases again linked property with liberty. In their dissents in the *Slaughter House Cases* (1874), United States Supreme Court Justices Stephen J. Field and Joseph P. Bradley asserted that a "man's right to his calling is property" and "an essential part of . . . liberty."

This emphasis on property as a bundle of rights that inhered in the individual altered the character of the conflict between the state and its citizens. It was still "a question of which of two powers or rights shall prevail," United States Supreme Court Justice Rufus Peckham declared in *Lochner* v. *New York* (1905), a liberty of contract case that struck down a New York law regulating the hours of bakery workers. On the one side remained the traditional police authority, "the power of the state to legislate." However, rights in property per se (the old "republican" notion of vested rights) no longer stood on the other side of the equation. Rather, the central issue was the ("liberal") principle of liberty: "the right of the individual to liberty of person and freedom of contract." As Judge Earl of the New York Court of Appeals had declared in the leading case of *In Re Jacobs* (1885), voiding a law that prohibited cigarmaking in certain tenement houses,

> Liberty [means] . . . the right of one to use his faculties in all lawful ways, to live and work where he will. . . . All laws, therefore, which impair or trammel these rights . . . are infringements upon his fundamental rights of liberty which are under constitutional protection.

By the end of the nineteenth century, the logic of classical liberal ideology had laid the conceptual foundations for the modern definition of civil liberties. As legally implemented, individualism and contractualism redefined property rights as "personal privacy" and "personal liberty." That restate-



For the NATIONAL GAZETTE.

PROPERTY.

THIS term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.

In the former sense, a man's land, or merchandise, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.

Where there is an excess of liberty, the effect is the same, tho' from an opposite cause.

Government is instituted to protect pro-

Property, *by James Madison, March 27, 1792.* National Gazette, *March 29, 1792. Library of Congress.*

ment—and the activist stance assumed by the judiciary to uphold it—helped to transform the meaning of civil rights in the United States after 1910 and especially after 1940. "Civil liberty" had become an individual's judicially protected right to privacy and self-expression—first in work . . . and subsequently in speech, religion, culture, and personal lifestyle.

By 1972, the emphasis on the non-economic rights of the individual had become so pervasive that they could be used to justify her or his property rights, reversing the traditional connection. "Property does not have rights," the United States Supreme Court declared in *Lynch* v. *Household Finance Corp.*,

> People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right.

Madison's Foresight

Nearly two centuries before *Lynch* and a century before *Jacobs* and *Lochner*, James Madison anticipated this conceptual revolution in civil liberties. In 1792, Madison composed an "Essay on Property." He began with a conventional statement from a legal text. Considered in "its particular application," Madison wrote, property was "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." Then the Virginia Congressman's mind soared, searching for a broader definition. He sought a perspective that would encompass his own rights-related struggles—the decade-long quest for religious liberty in Virginia, his opposition to "class legislation" enacted by state assemblies and, most recently, his role in adding a Bill of Rights to the Constitution of 1787.

This intellectual effort led Madison to a profoundly modern definition of civil liberties. "In its larger and juster meaning," he wrote in his "Essay," property

> embraces everything to which a man may attach a value or have a right. . . . A man has property in his opinions and a free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

"In a word," Madison concluded, "as a man is said to have a right to his property, he may be equally said to have a property in his rights."

From "rights of property" to "property in rights." There it was in a nutshell. Madison's intellectual odyssey anticipated the transformation in the American conception of civil liberties during the nineteenth century. A republican system of "civic" and "vested" rights based on the ownership of tangible property had given way to a classical liberal order based on the individual's "property in rights." At first these liberal rights were primarily economic but then, during the twentieth century, legislatures and jurists extended them to include religious, cultural, and personal "civil liberties" as well.

1. In *Griswold* v. *Connecticut* (1965), three United States Supreme Court justices made a similar use of the Ninth Amendment. They invoked the unenumerated right to "privacy" to strike down a ban on the distribution of contraceptives to married persons. *Griswold* likewise reflects the privacy arguments advanced in *Boyd* and in the Brandeis dissent in *Olmstead*, which are discussed in the next section.

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The Reality of Rights in an "Atolerant" Society

by JOEL B. GROSSMAN and CHARLES R. EPP

No society recognizes a greater range of individual rights entitled to fulfillment under its laws than the United States. These rights have come to include not only traditional ones protecting us *from* authoritarian and abusive governmental practices (such as those that primarily concerned the framers of the Bill of Rights), but also, to a lesser extent, rights or entitlements *to* government protection and benefits.

But the proclamation of a new right, a right newly recognized, or an existing right extended to a wider range of recipients, while it may afford symbolic assurances, does not automatically yield real effects. Rights are more like promissory notes than cash in hand. Further, the debate over new rights and their proper source tends to become confused with the different debate over how and when existing rights are to be protected, or indeed what they mean in practice or who is responsible for their enforcement. The situation becomes even more complicated when proliferation of rights leads to conflict between them; or when the realization of a particular right for someone may depend on the mobilization of scarce resources, or may infringe on the rights of someone else.

Just in the last few years, for example, Americans have debated the First Amendment rights of those who burn the flag as a form of political protest; the rights of homosexuals to equal treatment as members of the military, as spouses and as parents; the rights of blacks and other minorities to be free of racial slurs in our colleges and universities and in the workplace versus the rights of others to express their own views, even if racist; the right of citizens to bear arms free of governmental restriction versus the right of the people to pass laws to preserve public safety; the right of a woman to secure an abortion versus the right to life of the fetus; the rights of homeless persons to decent housing and/or the right to live in ways which many Americans find both disconcerting and threatening; the privacy right to be free of unnecessary drug and AIDS tests in the workplace versus the right of an employer to employ only drug-free workers; and the right of members of disadvantaged groups who are the traditional victims of discrimination to compensatory affirmative redress, versus the right of each employee to be treated without regard to race.

Some of these debates are between competing conceptions of individual rights; others, such as the one over affirmative action, are between those who believe that rights are, and must be, individually based, and those who believe that rights may (and, indeed, must) also accrue to groups and their members.

Rights are not free goods; they are contingent and contextual; and, it would appear, not all are possible at the same time. Against those who call for the continued expansion of substantive civil and personal rights, and sometimes the creation of new ones, are those who worry about the impact of such expansion on traditional rights and interests, and about the impact and consequences of an expanding rights consciousness on the fabric and dynamic of our liberal culture. At the very least, such tensions call for some national introspection and debate. Rights have become a major currency of politics; they are easily promised but not so easily realized. Paradoxically, the more that are guaranteed, the lower the percentage that may be fulfilled.

II

Some rights, such as those contained in the original Bill of Rights, were meant to protect individuals from the power of government and the abuse of democratic majorities. For example, the First Amendment places restrictions on the authority of Congress to pass laws limiting freedom of speech and the exercise of religion. Such limitations may seem anti-democratic, but the relationship between rights and democracy is complex. Alexander Meiklejohn, an influential constitutional scholar, argued that the purpose of the First Amendment guarantee against majority power is primarily to enhance the free circulation of ideas so that democratic decision-making will be enriched. While the modern conception of what is protected by the First Amendment has greatly expanded, it is clear that free expression and religion are at the core of our constitutional democracy even though they are also necessarily a limit on pure majority rule.

Few today question the value of the rights contained in the Bill of Rights in the abstract; however, these rights generate several kinds of tension in our society. First, the realization of abstract rights against majority sentiment may be limited by intolerance for minority opinions. Second, rights inevitably come into conflict with the precepts of majority governance: they may conflict with a majority's claim to the right to pass laws which they see fit. Finally, minority rights may conflict with the claims of other minorities seeking to protect their own prerogatives.

Tolerance, the acceptance of difference and diversity *and* a belief in resolving differences peaceably and fairly, is especially important in promoting and nourishing a culture of rights, although not all rights

October 15, 1979. Washington Post; *reprinted by permission of the D.C. Public Library.*

depend on tolerance. No regime of rights, no Bill of Rights, could flourish in an intolerant, completely self-interested society.

How tolerant *are* Americans? The United States is often thought to be a fairly tolerant society, and Americans believe themselves to be tolerant. With some notable exceptions their politics is one of moderation and compromise rather than extremism. In very brief compass we will describe what Americans believe about rights and tolerance, why they believe what they do, and then assess the consequences of those beliefs. Public opinion research, we will see, yields many contradictions.

Numerous studies reveal that Americans, when asked, in general strongly support the abstract rights embodied in the Bill of Rights, such as the freedoms of speech, religion, the press, and assembly embodied in the First Amendment, the concepts of due process and fair play articulated in the Fifth and Fourteenth Amendments, and the principle of equality found in the Fourteenth Amendment. By "abstract rights" we mean rights seen as a general value and not connected to any particular group's exercise of those rights, or to any particular definition of them. Public support for these rights has become a hallmark of the American political system even as citizens fiercely debate their respective meanings.

If most Americans support such rights in the abstract, however, they often do not support their application to certain unpopular groups, or to others whom they dislike. Many studies have shown that large proportions of our population are willing to deny (or at least accept the denial of) important rights to political and cultural groups that are perceived to be deviant and out of the mainstream.

For example, in the 1950s and 1960s Americans were quite intolerant of communists, socialists, and atheists. Many people went beyond simply disagreeing with these groups: they said they would be willing to deny them the right to speak in a public forum, to have their books in public libraries, and to meet publicly. In one survey in 1954, only 27 percent of those polled (almost all of whom had professed a strong belief in the principle of free speech) believed that a communist should be allowed to speak; only 6 percent believed that such a person should be allowed to teach in a public school or college; only 37 percent would have permitted a speech against religion; only 42 percent favored allowing a speech advocating government ownership of industry; and only 70 percent would have permitted a speech by a person suspected of communism who under oath had *denied* that he had been a communist. There is some evidence that Americans have become more tol-

Table I
Freedom of Speech: Increasing Tolerance, 1954 to 1974
(percent of public willing to grant the right)

Year	Admitted Communist	Speech against religion	Speech for government ownership of industry
1954	27	37	58
1972	52	65	77
1974	58	62	75

Source: Hazel Erskine and Richard L. Siegel, "Civil Liberties and the American Public," 31 *Journal of Social Issues* (1975), 13-29.

erant of dissident groups since the 1950s. At the least, as summarized in Table I, they have become more tolerant of the groups they once did not tolerate. Beginning in the early 1970s, 50 to 60 percent of the public came to support a communist's right to speak. Likewise, public willingness to fire a communist teacher dropped from nearly 90 percent of the population in the 1960s to about 50 percent after 1970. Tolerance for beliefs other than communism had increased by the early 1970s as well. Sixty-five percent of the public by then said they would permit a speech against religion, and 77 percent would have permitted a speech advocating government ownership of industry. These figures suggest, however, that many Americans, albeit fewer than in the 1950s, are still unwilling to extend the abstract rights of democracy to certain members of society.

While Americans have become more tolerant of communists they seem to have become less tolerant of a variety of other groups. But unlike the 1950s, when Americans generally agreed that communists should be denied free speech rights (and restricted in other ways), they no longer agree on which groups should now be similarly limited: one person is intolerant of one group, while another is intolerant of a different group. Almost everybody seems to be intolerant of somebody.

One important recent study conducted by political scientists John L. Sullivan, James Piereson and George E. Marcus, allowed respondents to name which political group they disliked the most, and then asked whether members of that group should be allowed to speak or teach about their views. The 1970s' respondents were still fairly intolerant of dissident groups, even if not quite as much so as their counterparts in the 1950s. Conservatives tend to be intolerant toward groups on the left, while liberals are more likely to be intolerant of groups on the right. As American society has become more diverse, the objects of its intolerance also have become more diverse. Only 12 percent of those responding to a 1987 Gallup poll, as shown in Table II, said they would be tolerant of any type of group as a neighbor; the remainder, apart from those with no opinion, expressed opposition to some religious, racial, or ethnic group. Sullivan and his colleagues have characterized this as "pluralistic intolerance."

While tolerance of unpopular ideas and the right of individuals to express them seems necessary for the practical realization of ideals contained in the Bill of Rights, some people regularly have claimed exactly the opposite. One justification for denying free speech rights to communists in the 1950s was that they covertly intended to overthrow democracy and thus abolish the free speech rights of others. In the late 1980s, a similar justification has been employed for prohibitions of racist speech. Such speech, it is said, has no intrinsic value; it only intimidates and unfairly stigmatizes racial minorities; and it limits *their* freedom of expression and disadvantages them politically.

A number of universities have passed rules against racially offensive speech on campus; some of those rules have prohibited only speech directed at individuals, while others are broader in scope. Indeed "racists" rank near the top of the groups that political liberals identify as unworthy of political tolerance. Conservatives are marginally even more willing to curtail racist speech, although racists rank near the bottom of the groups whose speech rights conservatives, who are generally more willing to limit such rights, would limit.

We have noted that Americans are strongly supportive of the principles of the Bill of Rights (and especially the First Amendment) in the abstract, but are less supportive of the application of those rights to certain disliked groups. Americans are, if anything, even more ambivalent about the meaning and application of the principle of equality. Numerous studies have found strong support for political equality generally, such as the right to vote, the "one person-one vote" principle of legislative apportionment, and the elimination of racial discrimination in public accommodations and in holding public office. In-depth interviews with people from various backgrounds by political scientist Jennifer Hochschild revealed almost universal and unwavering support for the principle of political equality—the equal distribution of political and civil rights. But her study and others have also cap-

Table II
Groups Not Wanted as Neighbors
(percentage of respondents choosing each category, 1987)

Minority religious cults	Blacks	Religious fundamentalists	Unmarried single people living together	Hispanics
44	13	13	12	9

Jews	Protestants	Catholics	None/all are OK	No opinion
3	2	1	12	29

Source: The Gallup Report (Jan.-Feb., 1987), pp. 20-21.

tured the deep hesitancy and uncertainty of Americans regarding economic equality.

The debate over affirmative action underscores this ambivalence. There are two general approaches to affirmative action—one that *exhorts* agencies to hire more women and racial minorities, and one that *requires* that specific, well-defined steps, sometimes including specific goals, be employed to achieve greater diversity. The distinction is important, but few opinion polls clarify it, with the unfortunate result that polling data reflect answers only to questions about "affirmative action" in general. Nevertheless, public support for the general category of "affirmative action" policies has always been quite limited. From the mid-1970s through the late 1980s, the Gallup Poll showed a consistently small minority of about ten percent of the public who favored affirmative action policies, while a large majority, exceeding eighty percent, opposed it as an unfair and impermissible form of "reverse discrimination." The policies of the Reagan and Bush administrations have strongly opposed affirmative action that exceeds exhortation or which is more than compensation to the actual individual victims of discrimination ("make-whole relief"), but Congress and the Supreme Court have given it greater, albeit intermittent, support.

The Supreme Court, while badly divided on affirmative action, has nonetheless sometimes supported it where necessary to remedy identifiable and specific past discrimination not limited to individual recompense. In *Richmond* v. *Croson*, (1989) it ruled that states and local governments had no general authority to establish a "minority set-aside" program for contractors doing business with the city. The majority in *Croson* said that without some specific remedial purpose and justification, this kind of affirmative action policy was a violation of the principle of racial equality embodied in the equal protection clause of the Fourteenth Amendment *and* numerous civil rights laws. But then, only a year later, in *Metro Broadcasting* v. *F.C.C.* (1990), the Court affirmed *Congress'* right to mandate affirmative action remedies without the need to show specific past discrimination. The battle over affirmative action, which continues, embodies the perennial debate between equality of opportunity and equality of result.

While political leaders take a more balanced view than the general public, there can be little doubt that there is much more support for racial equality in theory than in practice. In 1942, for example, only one-third of the public accepted integration of whites and blacks in the public schools. In 1945, less than 50 percent believed that whites and blacks should have equal job opportunities. By the 1980s, however, over 90 percent of the public supported public school integration, equal job opportunity, and equality in public accommodations, at least as general principles.

In contrast, public support for government efforts to implement those principles and actually attain racial equality is considerably lower. Slightly less than 40 percent of whites supported government efforts to ensure equal treatment in jobs in the 1960s and 1970s. White support (or acceptance) of government efforts actually to take steps to integrate schools dropped from a high of 48 percent in 1966 to 21 percent in 1976. Such opposition to government intervention to achieve school integration reflects strong opposition to the primary mechanism for integration, busing. Throughout the 1970s, white support for busing fluctuated between 9 to 17 percent, depending on the poll; support actually rose to 21 percent in 1983 and 29 percent in 1990. Support for affirmative action, as we have seen, is considerably lower than that.

Black Americans differ sharply from whites on these issues. In the mid-1980s, between 80 and 90 percent of blacks supported government initiatives to integrate schools and affirmative action to guarantee equal access to jobs, the same percentage as in the 1960s. But even among blacks support is wavering; as early as 1976 half of the blacks interviewed in a Detroit poll opposed forced busing to achieve integration, partly because they preferred more direct efforts to improve the quality of education. Also, there are growing divisions in the black community, for example, about the efficacy of continued efforts to secure and preserve school

Almost everybody seems to be intolerant of somebody.

integration at all costs.

Racial tolerance might also be measured by the willingness of people to categorize individuals based on their race. A survey reported in *The New York Times* in January 1991 found that many whites stereotype members of minority races by attributing undesirable qualities to them. For example, 78 percent of white respondents believed that blacks were more likely to prefer living on welfare; 74 percent thought the same of Hispanics; 62 percent believed blacks, and 56 percent Hispanics, to be less hard-working than whites; 56 percent believed blacks, and 50 percent Hispanics, to be more violence-prone than whites; 53 percent believed blacks, and 55 percent Hispanics, to be less intelligent; and 51 percent believed blacks, and 61 percent Hispanics, to be less patriotic. The affected minorities, of course, did not share such opinions.

The paradox of Americans' attitudes about racial equality—strong support for the abstract principle but opposition to remedial affirmative action to realize that principle, particularly in the workplace, results from several factors. First, implementation efforts are often seen as coercive and an infringement on individual liberty. Many Americans oppose such policies simply because they oppose government intervention in general. But such abstract opposition to government intervention in general, like abstract support for the principles of the Bill of Rights, is often applied inconsistently. Despite such opposition to government intervention, many Americans have at times favored government action to limit the civil liberties and rights of others, as we have seen.

Second, implementation of racial equality principles is often perceived as a threat to the advancement of whites, and thus to their economic status. The rights of others are most likely to be supported when they are perceived as cost-free. If the right to be treated equally, even in the workplace, is generally accepted, the "right" to compensatory advantages for minorities is not; for the current generation of white workers does not perceive itself as "guilty" of anything. Further, many white Americans now believe that the problems of race discrimination have largely been solved, and that further efforts unduly favor blacks. This perception, of course, is not shared by black Americans, many of whom believe that even with the end of the Jim Crow system and overt legal discrimination, racism not only exists but appears to be flourishing anew. In a 1989 Gallup survey, 68 percent of the white respondents believed that blacks and whites now have equal chances for jobs for which they are qualified (contrary to empirical evidence), while only 43 percent of black respondents (itself a surprisingly large portion) believed the same.

These findings—about attitudes toward the Bill of Rights and attitudes toward racial equality—reinforce the accuracy of political scientist Austin Sarat's observation that "most Americans want to be treated as well as anyone else, but do not mind if others are treated less well than they are." We might add that Americans certainly do mind if others seem to be treated better, for whatever reason. The evidence, taken as a whole, thus seems to amply support Sarat's conclusion that "Americans seem too willing to tolerate restrictions on the rights of those who are strange, different, or threatening even as they profess devotion to the principles from which those rights derive."

III

What accounts for this mixed pattern of tolerance and support for rights in the abstract, but ambivalence toward their full realization? Some sources of the variation are social and situational, while others are personal and psychological.

Social or situational factors include degree of involvement in politics, levels of income and education, political affiliation, and religion. Many studies have shown that people who are involved in politics, such as community and political leaders and activists, tend to be more tolerant of opposing viewpoints. Herbert McClosky and Alida Brill, for example, found that lawyers supported free speech in a variety of contexts by as much as 50 percent more than the mass public, political leaders by as much as 28 percent more. When asked whether government should censor the press, lawyers answered "no" 25 percent more often than members of the general public, and political leaders 15 percent more often. Arguably, lawyers, political leaders, and political activists tend to support the right of free expression more strongly than others because they must deal with disagreements over political ideas continually and have learned to compromise and tolerate opposing views in order to succeed politically.

Lawyers and political leaders also tend to have had more education than members of the general public, an important factor in tolerance. Those with more education tend to be more tolerant than those with less formal education. Individuals with higher education levels are more likely to be familiar with arguments favoring principled and consistent support for civil liberties, and such individuals are more likely to be exposed to a variety of viewpoints and values. As a result,

Anti-busing demonstration, Prince Georges County, Maryland, December 11, 1972. D.C. Public Library.

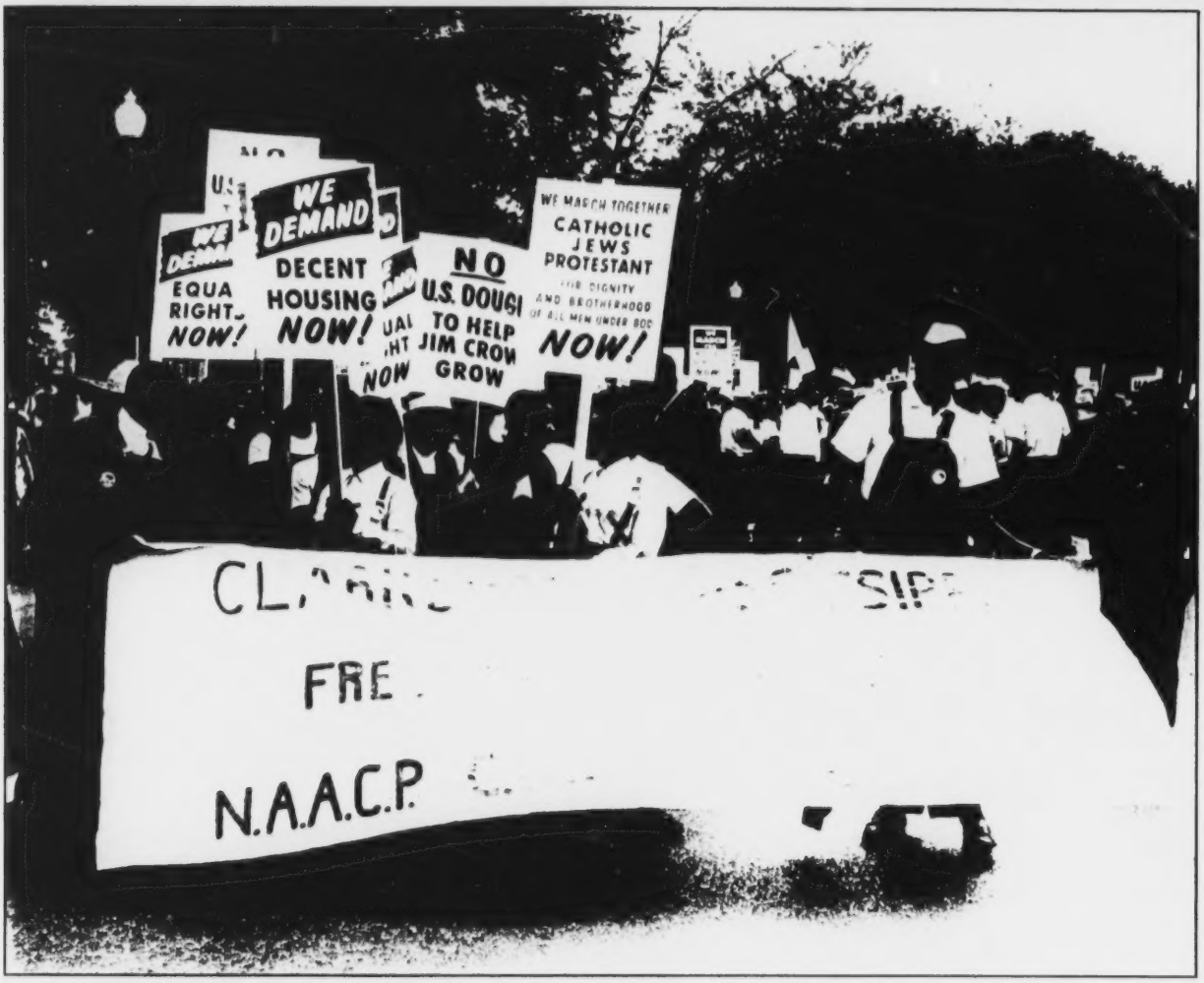
increases in education seem to encourage increased willingness to tolerate diverse points of view. Income, to the extent that it measures something different from education, also is associated with variations in tolerance; those with higher income levels tend to be more supportive of civil liberties, perhaps because income provides enough personal security and leisure to insulate individuals from perceptions of economic or status threats.

Several studies also have shown that political and religious affiliation significantly affects support for the rights of unpopular groups. Political liberals, while they tend to be more intolerant of conservative groups than of liberal groups, nevertheless are generally more supportive of civil liberties than are political conservatives, by 10 to 20 percentage points. Frequent church attenders tend to be less tolerant of opposing views; one study found that non-attenders were almost 10 to 20 percent more tolerant of opposing viewpoints than were weekly churchgoers. People who claim no religious affiliation (themselves often the objects of intolerance) are more tolerant than those who are members of religious denominations, by as much as 23 percent.

Psychological factors are also important. Perceptions, however valid empirically, that a group is a personal, economic, or symbolic threat tend to sharply lower tolerance for that group. Some evidence also suggests that perceptions of threat diminish a person's tolerance for *all* opposing groups, not just the threatening one. While blacks' tolerance toward opposing groups tends to vary by the education and income level of the respondent, as expected, a perception of direct threat in the form of racism tends to lower blacks' tolerance considerably—although the effect is less pronounced the higher the education level of the respondent.

The effect of perceptions of threat would certainly explain the decreasing intolerance toward communists after the 1960s, when they could be perceived as a threat only by the most paranoid, as well as the intense local opposition to the proposed Nazi march through Skokie, Illinois in 1977, a community with a large population of Holocaust survivors. It would not, however, explain the relatively high percentage of Americans (more than 80 percent) who opposed extending First Amendment protections to the Nazi marchers even though they were not directly threatened themselves.

It was once thought that the AIDS crisis encouraged an erosion in the growing tolerance for homosexuals. In a 1985 Gallup poll, 37 percent of the respondents stated that the AIDS epidemic changed



March on Washington, August 28, 1963. Library of Congress.

their opinion of homosexuals for the worse. But more recent studies suggest that the threat of AIDS merely provided a pretext for the expression of more deeply-rooted intolerance toward homosexuals.

Personal self-esteem and psychological security tend to increase tolerance for opposing viewpoints, while dogmatism—the certainty that one's beliefs are absolutely right—tends to decrease it. The latter suggests why the political debates that generate the most conflict and intolerance, such as the controversy over abortion, often involve so-called "single issue groups," in which opposing sides have intense and uncompromising beliefs.

Finally, even though many Americans are not consistently tolerant of opposing viewpoints, those who most strongly support the abstract rights contained in the Bill of Rights are more tolerant of opposing viewpoints than are those who are less strong supporters of those abstract rights. Support for rights in the abstract, it would appear, is not irrelevant to support for their application in practice.

The famous song, "You've Got to be Taught," from Rodgers and Hammerstein's *South Pacific*, tells us that tolerance is natural and inborn, and that intolerance is essentially learned behavior which, presumably, can be unlearned if the will to do so is present. The evidence, however, suggests otherwise—that it is tolerance that must be taught and learned; and that, at least according to McClosky and Brill, it may be more difficult to learn than intolerance. It is beyond the scope of this essay to examine how tolerance is most effectively learned. There is some evidence that learning about—and experiencing—civil liberties *tends* to generate tolerant attitudes and behavior. But it is by no means a perfect correlation; experience may also generate a backlash of intolerance, particularly if it results in the perception that "excess" rights have been unfairly conferred on others, or that others' claim to rights reduces one's own prerogatives and expectations.

Over and above the usual agencies and institutions of socialization, the culture of rights in a society, and particularly their articulation in the law, may play a critical role in socializing people to tolerance. Major Supreme Court decisions since the 1950s have surely had this effect, by emphasizing the value of civil liberties, directing the public's attention to the notion and availability of rights, and announcing that government has some responsibility to protect them. Other recent trends may not encourage tolerance, however. For example, as mentioned earlier, the adversarial pursuit of "rights" moti-

While political leaders take a more balanced view than the general public, there can be little doubt that there is much more support for racial equality in theory than in practice.

vated primarily by self-interest, which is at the core of a highly litigious society devoted, in Lawrence Friedman's words, to the pursuit of "total justice," is unlikely to contribute much to greater political and social tolerance.

IV

How can we reconcile the relatively high levels of formal rights, and the high levels of abstract tolerance in our society, with the very mixed record of support for the realization of those rights and tolerance in more concrete situations? There are several possible explanations. Perhaps the most important is based on survey results which show, as noted earlier, that political leaders and activists are more supportive of rights than are members of the general public. Political leaders protect civil liberties, it is said, by institutionalizing them in law and demonstrating them in practice, notwithstanding general public ambivalence. However it is important to note the following caveat. Virtually all of this survey data come from a period in our history in which liberal forces and ideas were unusually dominant. But that liberal dominance may now be ending with a pronounced conservative backlash. Two of the three branches of the national government now seem to be, for the foreseeable future, in conservative hands. Thus it remains to be seen whether the pro-rights, pro-tolerance attitudes of leaders and activists is likely to endure (as some of the evidence we have presented suggests), or whether it was merely an artifact of transient liberal ideology and thus will change substantially.

History reminds us that political leaders have not *always* been in the vanguard of tolerance. And when they are not, their views have often prevailed over the views of the public, with the result that intolerance has been embedded in the law. A study by political scientist James L. Gibson of the anti-communist laws of the 1950s, for example, found that the attitudes of leaders and public officials were far more important for determining whether a state passed such laws than were the attitudes of ordinary citizens. In fact, Gibson's study revealed that most people at the time were not nearly as concerned about communism as were their leaders. Evidence thus suggests that pro-civil liberties policies—the realization of tolerance—may be dependent less on what ordinary citizens think than on the disposition of their leaders. But it is also probably the case that both leaders and citizens alike now are more thoroughly socialized to civil liberties beliefs and tolerance than were their 1950s predecessors; and that levels of tolerance might remain at or near their more advanced recent levels. The conservative backlash seems unlikely to produce a complete reversion, only some incremental tinkering with basic principles and, more likely, more drastic rollbacks in the intensity and resources devoted to rights enforcement.

This suggests a second explanation—that the "attitudes" of many citizens toward tolerance and the civil liberties of others are essentially passive and extremely fragile constructs, less coherent principles or prologues to action than often hasty responses to harried survey researchers. Few of these attitudes are well enough formed, or strongly enough held, absent other stimuli, to actually lead to active support for, or opposition to, the rights of others. Thus what has been reported as "intolerance" may be better described, in political scientist John Mueller's term, as "atolerance" or relative indifference.

Regardless of the impact of citizen tolerance or intolerance on the law and public policy, what ordinary citizens think can still be very influential at a different level. Intolerance may emerge in practical, everyday situations at school, work, or on the street through individual actions which affect real people even if not formal government policy. This everyday intolerance can, for example, keep rights theoretically guaranteed by law from becoming fully effective by creating, among the intended beneficiaries, social or cultural inhibitions against claiming those rights.

Discrimination is an excellent example. A report by Richard E. Miller and Austin Sarat found that discrimination grievances were less likely than other personal injuries to be pursued as formal claims or taken to court. Followup interviews with some of the self-reported victims of discrimination in that study revealed that their reluctance to pursue appropriate legal or administrative remedies came at least in part from the fear of being labeled as troublemakers and thus "twice" victimized. They understood better than most that the intolerance of fellow workers and job supervisors, though contrary to the expressed aims of the law, were nonetheless real barriers to vindicating their rights. And they also understood especially well how inadequate and futile legal remedies could be even to maintain rights that in theory had already been achieved.

The difficulty of implementing rights in practice suggested by such research has led some scholars to the conclusion that formal legal rights may be more symbolic than real imperatives to government action and social change. Some argue that "rights" are in fact a dangerous myth that distracts those hurt most

Nazi Demonstration, Marquette Park, Chicago, Illinois, July 9, 1979. UPI/Bettmann.

by political and economic inequality from other, more politically practical, means of bettering their situation. The reality of rights in our society, as political scientist Stuart Scheingold suggests, is probably somewhere between the two extremes. Abstract notions of rights may have contributed to the civil rights movement. But it was the mobilization of resources and overwhelming political pressure, stimulated in part by the legal announcement of those rights, and not the abstract rights themselves or a general sense of altruism, that brought about major, albeit partial and inadequate, change.

V

The gap between the promises of both the Bill of Rights and civil rights laws and the reality of their full implementation remains large. There is still widespread intolerance toward racial minorities which serves to undermine the promise and goals of the law. The Constitution's legacy of slavery and racism may never be erased completely. Further, there are inherent tensions between the rights of opposing groups, as there are between different categories of rights. Yet the modern institutionalization of civil rights and liberties in our Constitution and laws remains symbolically important, even if their practical effect depends on support by political leaders, adequate resources for mobilization and enforcement, and a culture of tolerance which are not always available. Ironically, intolerance may be increased, as already suggested, by aggressive implementation, and as groups imbued with new rights and enhanced power loom as new economic or political threats to traditional majorities.

The dynamic of rights is exceedingly complex. Rights cannot be understood or appreciated outside of the cultural soil and political environment where they may be nourished, opposed, or merely tolerated. The "reality" of rights is thus to be found not just in their formal exposition in the law, or in how citizens view them in the abstract, but in how they affect and condition individual attitudes and action, political movements, and both institutional and individual behavior.

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Roundtable of Participants in the Passage of the Civil Rights Act of 1964

edited by RAYMOND E. WOLFINGER

The 1989 annual meeting of the American Political Science Association included a series of panels to commemorate the twenty-fifth anniversary of the passage of the 1964 Civil Rights Act. This very important piece of legislation made a dramatic difference in American life. It prohibited racial discrimination in employment and public facilities like hotels and restaurants, and provided powerful tools to eliminate discrimination in activities receiving federal grants. This article consists of an edited transcript of a roundtable on passage of the Civil Rights Act by participants in the struggle to enact the new law. The roundtable was organized and chaired by ***John G. Stewart****, vice-president of the Tennessee Valley Authority, who in 1964 was legislative assistant to Senator Hubert H. Humphrey (D., Minn.). Senator Humphrey was the Majority Whip and the principal manager of the civil rights bill in the Senate.*

The other members of the roundtable:

Andrew Young*, Mayor of Atlanta in 1989, was the principal assistant to Dr. Martin Luther King twenty-five years earlier.*

David B. Filvaroff*, Dean of the School of Law at the State University of New York, Buffalo. In 1963 and 1964, he was the principal assistant to Deputy Attorney General Nicholas deB. Katzenbach, who represented the Kennedy Administration in negotiations with Representative William McCulloch (R., Ohio) that settled the bill's major provisions in the summer and early fall of 1963. Thereafter, Katzenbach was in charge of day-to-day relations with Congress concerning the substantive aspects of the bill.*

Stephen Horn *is the Trustee Professor of Political Science at California State University, Long Beach. He was then the principal legislative assistant to Senator Thomas H. Kuchel (R., California), the Minority Whip. Senator Kuchel was Senator Humphrey's counterpart and Horn fulfilled a role for the Republicans similar to Stewart's on the Democratic side of the aisle.*

Raymond E. Wolfinger *is professor of political science at the University of California at Berkeley. In 1964, he was an assistant professor on research leave from Stanford University on Senator Humphrey's staff.*

In the spring of 1963, the Southern Christian Leadership Conference under Dr. King's leadership organized demonstrations to protest segregated and unequal facilities and services in Birmingham, Alabama. The completely peaceful demonstrations were met with extraordinary violence by an army of law officers, many imported from the surrounding countryside. For weeks, television viewers all across the nation saw police dogs lunging at the throats of children and demonstrators being blown along sidewalks by high-pressure fire hoses. Birmingham brought civil rights to the front of the political stage and presented a new challenge to President John F. Kennedy, who had made civil rights legislation a very low priority. One of the President's first reactions to Birmingham was deciding what he should ask Congress to do. Congress had not been hospitable to meaningful civil rights proposals in the past. The bills passed in 1957 and 1960 had had little effect on the segregation and subordination imposed on blacks in the South. Kennedy decided to draft and submit to Congress a bill that, if enacted, would make sweeping changes in the South. The prospects were not very positive, however. The Senate, in particular, was considered the graveyard of civil rights legislation.

John G. Stewart: The principal weapon in blocking prior civil rights bills or compromising them in key respects was the threat or the reality of the filibuster conducted by Southern Democrats.[1] However, for many senators the right of unlimited debate represented an essential and necessary element of the U.S. Senate and its role in the federal system. It was seen as a legitimate and necessary part of the Senate's institutional role. This view was especially prevalent among moderate to conservative senators of both parties whose votes were essential in achieving cloture and ending the filibuster. What you would need in actual votes for cloture would be 66 or, more than likely, 67 since it was assumed all 100 senators would be voting.

There had been a number of prior efforts to relax the cloture rule, such as stopping debate by a simple or constitutional majority of 51, or three-fifths (60) of those present and voting, but they had all failed; so a two-thirds majority would still be needed. The reason that they failed was that the Southern Democrats filibustered the efforts to change the rule, which is Senate Rule XXII. Again, the middle-of-the-road and conservative senators generally

voted against efforts to relax Rule XXII. The most recent effort had taken place in 1963, earlier in the year that the civil rights bill was actually introduced, when stakes relating to civil rights were clear to all senators. The Senate consciously refused to modify its procedures for limiting debate.

In 1957, the Majority Leader, Lyndon Johnson, negotiated major compromises in the Civil Rights Act of 1957 and in those circumstances the Southern Democrats agreed to withhold their filibuster. Simply the threat under those circumstances was sufficient. In 1960, Lyndon Johnson essentially lost control of the situation, something that almost never happened when he was Senate Majority Leader. A filibuster took place and LBJ was unable to shut it off, although he tried. Cloture failed dismally, falling 21 votes short of what was needed. A weakened version of the Eisenhower administration's 1960 bill eventually passed the House while the Senate was locked in debate. Johnson seized the House bill and was able to pass it in weakened form. This time the reality of a successful filibuster had forced significant compromises. In 1962, an effort by the Kennedy administration to outlaw the literacy test in voter registration provoked another filibuster. Two attempts at cloture failed in 1962 and the bill was simply abandoned. This time, total victory for the Southern Democrats.

Crucial voting patterns appeared in these prior efforts. Those senators holding the balance of power on cloture—ranging from about 23 senators in 1957 to 30 in 1960 and 24 in 1962—voted heavily against cloture and supported weakening compromises or outright abandonment. In each instance, the President, Eisenhower in 1957 and 1960 and Kennedy in 1962, provided confused or minimum support, lukewarm support at best. The civil rights forces themselves in the Senate were also confused and ineffectual. Only the Southern Democrats looked like they knew what they were doing. By the spring of 1963, the stakes had changed dramatically. Violence gripped the nation. On the very evening that President Kennedy sent his civil rights message to the Congress and addressed the nation, Medgar Evers [leader of the National Association for the Advancement of Colored People (NAACP) in Mississippi] was murdered in Mississippi.

Following that blow, President Kennedy himself was shot. The need for positive action had never been greater and yet the realities within the Senate had not changed. Efforts to relax Rule XXII had failed in early 1963. The filibuster and the difficulty of cloture dominated the political and legislative environment.

Andrew Young: I will start in Birmingham. I think that whenever they read off my resume and say "He was instrumental in writing the 1964 and 1965 Civil Rights Acts," I always have a little bit of hesitation because most of you kind of folk think that bills are written by legislative assistants. The truth of it is that although I never wrote so much as a memo or made a speech or took part in a consultation on the 1964 or 1965 Civil Rights Acts, yet we were very consciously writing those bills. The demonstrations in Birmingham were specifically designed as measures to educate the United States on the dynamics of race relations and racial segregation.

We understood television at that time to be educational TV. I remember civil rights leader Wyatt Walker saying that commercial time cost about $30,000 a minute on the NBC or CBS nightly news program. We figured therefore that we were getting close to a million dollars' worth of television time when we got three minutes or so on each of the networks, plus local TV. So we took very seriously the message that was coming across in our demonstrations. We were very specific. We met with the press in the morning and told them what we were going to do and why we were going to do it and then almost always before noon we met everybody's deadline. We did what we said we were going to do. Now usually that meant only one thing: getting people to a public accommodation and being rejected or arrested.[2] We had a series of demonstrations around public accommodations to show how ridiculous segregation in public accommodations was.

We also made efforts to march to the voter registration desk in city hall to show that we couldn't even get to the registration office. We went to places like banks and asked to be employed and when we were rejected, we got down on our knees and prayed and we sang hymns until they came and took us to jail. We were very consciously writing legislation through action and the civil rights bill of 1964 pretty definitely reflects the kind of agenda that was established by those demonstrations. But we had no illusions about the ease of passage. In fact, all of us were very much surprised and Martin used to say all the time that some of us are going to have to die before this country changes. As preachers we were used to saying that there is no remission of sin without the shedding of innocent blood and the blood of the martyrs is the seed of the church in progress. Yet none of us could have imagined that it would take the assassination of Medgar Evers and then the President of the United States before the moral climate changed.

There were four things that occurred. First of all, Medgar Evers' assassination brought out the fact that this was not a game. This was a real conflict in our society.

Second, the March on Washington, where Martin made it very clear; in moral language he simply said that what we were fighting about was the American dream. That wasn't what *we* felt to be the most important part of that

Sixteenth Street Baptist Church, Birmingham, Alabama, after bombing, September 1963, in which four black children were killed. AP/Wide World Photos.

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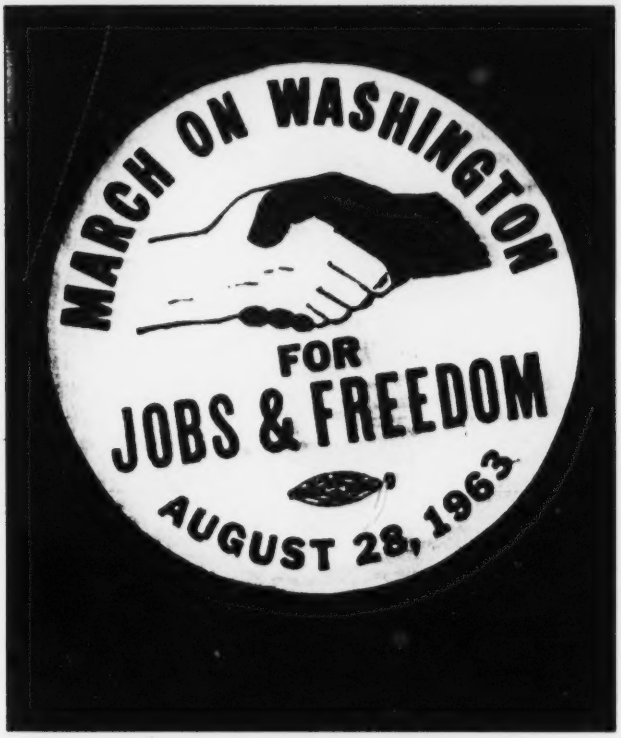

Washington Post; *reprinted by permission of the D.C. Public Library.*

March on Washington speech, but that was the part that Middle America latched on to.

Shortly after that you have the bombing of the church in Birmingham [in which four little black girls were killed in the fall of 1963]. And then the assassination of the President. Lyndon Johnson then inherited the mantle and wore it with considerably more political skill than President Kennedy had had but still not enough to effect cloture. As a result of the March on Washington, the National Council of Churches, the Rabbinical Association of America, and the religious community of America generally joined forces with the civil rights movement and began to try to help Americans see that this was a moral issue.

I believe the turning point on the filibuster was a series of missions that were put together. Usually the leaders included Eugene Carson Blake of the Presbyterian Church, who at that time was chairman of the National Council of Churches; J. Irwin Miller, who was CEO of Cummins Engine, was also the President of the National Council of Churches for a period. So you had a top businessman and a top religious leader. They joined with people like Fanny Lou Hamer of SNCC [Student Nonviolent Coordinating Committee] and they made visits to the home states of the senators from Iowa, Nebraska, North Dakota, South Dakota, and Kansas.

Once they were there, they brought in the local church leaders so that the local Methodist Bishop joined them, the local leader of the Lutheran Church, the local president of the Rabbinical Association, so that that was a religious appeal to the senators from these five Midwestern states. I don't even remember who those senators were, save one. That was Senator Hickenlooper, because when Hickenlooper got religion, the whole thing changed.[3] When it no longer became a matter of right and left or liberal and conservative, but when it was demonstrated by this group of church and civil rights leaders that there were clear moral and religious issues involved, you gave those senators, eight of the ten of whom were Republican, a clear rationale for opposing something [the filibuster] that they felt to be a lifelong part of the democratic tradition and very important in the case of a minority in a constitutional body.

So I think that those were things that came together making possible the passage of the 1964 Civil Rights Act. A similar kind of team and a similar kind of action were repeated in Selma the following year to make possible the 1965 Voting Rights Act. By 1965 we kind of knew what we were doing. In 1963 and 1964 we were seeking answers and yet this wasn't an emotional outburst of frustration and protest in the South. There was some of that, but I think the thing that characterized most of our demonstrations around Birmingham, that will distinguish us from our younger counterparts in SNCC, was that we knew that we could get killed. We knew that it was dangerous. We had families. We weren't playing games. We were trying to be as cautious and conservative and square as possible.

Our appeal and all of our efforts were to deradicalize our efforts and make them mainstream religious Americana. I think that was part of the reason for our success because we knew that our role was to enlighten white Americans. I always say that Martin Luther King was not a black leader. He didn't have to lead black folk anywhere. There was absolutely nothing in the letter from the Birmingham jail that everybody black didn't know. There was nothing that he said in his speech in the March on Washington that everybody black didn't understand. The role of a leader in that time was to take an eleven percent black population and find a way to get forty percent of the white population to add on and to create a majority. When you talked about the filibuster, you had to create a two-thirds majority. You did not have change in America unless an overwhelming majority of white Americans understood. So the significant effort about our demonstrations was how do we reach white Americans and help them to know what black America is experiencing? There was a feeling that if we could use television and if we could work with the churches, if we could get key editorial writers to understand clearly what we were trying to do, that was the way to change America and as Martin said, help America to live out the true meaning of its creed.

John Stewart: Let me just say in passing that on the final day of passage of the bill, Senator Richard Russell of Georgia, leader of the Southern Democratic opposition, said that it was the most sophisticated lobbying operation that he had ever witnessed in 30 years in the Senate. He

said that on the Senate floor and that was what Mayor Young was describing.

David Filvaroff is now going to pick up the story in the House and briefly sketch what happened there and then we will turn to Steve Horn.

David B. Filvaroff: There was a sea change in American law and politics in the 1960s. It did not come out of Washington. It did not come in ideology or leadership out of academia; not political science departments and not law schools. It came out of the streets. It came from the people who were represented by Dr. King, Mayor Young, and others. It reached its peak in 1963 in the streets of Birmingham. It was a time of violence. We in this country, I think, were luckier than we deserve to have had that movement be led by people who were committed to nonviolence.

The violence came from the other side but the strength of the movement was its appeal to American ideals and its commitment to nonviolence. As Mayor Young has suggested, that is what allowed it to reach and deeply touch the consciousness of a nation and that is what made possible enactment of the Civil Rights Act of 1964.

The media were crucial. The pictures of school children and others in Birmingham confronted with police dogs and fire hoses were what generated the overwhelming popular response.

From my perspective, that was an essential part of the setting in which Washington and the administration operated. Whatever the commitment of the Kennedy administration early in its term, and indeed even earlier in 1963, it was changed by Birmingham. Representatives of the administration came back from Birmingham convinced that major civil rights legislation was essential. The inevitable alternatives were violence and continued crises.

There were two key ingredients the administration saw as necessary to deal with the substantive problems and they are precisely the ones that Mayor Young has mentioned.

First, the legislation must cover desegregating public accommodations—hotels, restaurants, theaters, and the like. That was the focus of what was going on in Birmingham. The second essential ingredient grew out of the Department of Justice's experience in lawsuits brought to enforce the rights of black people to vote in the South. New laws were needed to overcome the barriers erected by local officials. The administration agreed fully with civil rights leaders that access to the polling booth was crucial to working any real change in the politics and the reality of life in the South. Indeed, as we have learned, this is true across the country.

With those two ingredients it was apparent to the administration that a bill having significant substantive impact could not pass unless cloture could be imposed in the Senate.

It was also understood that a significant number of Northern Democrats, even some liberals, were committed to the Senate tradition of unlimited debate and not voting for cloture. Most of these were believed to be persuadable, but even so the last eight to twelve votes to achieve cloture had to come from a group of conservative Republicans, people who would look to Everett Dirksen for leadership. These senators came from, among other places, the precise states in which the Mayor has said church leaders sought to mobilize the religious community.

The administration's strategy, unlike that of 1957 and 1960, was to develop bipartisan support and pass the bill in the House first. If the bill went to the Senate as one supported by House Republicans generally, and the Republican House leadership in particular, the likelihood of obtaining the conservative Republican votes necessary for cloture would be dramatically increased. And, if a bipartisan bill were to be worked out, the only place to do it was in the House Judiciary Committee and its relevant subcommittee. It could not be done with hundreds of House members on the floor of the House. [The bill that became the 1964 Civil Rights Act was submitted to Congress by President Kennedy on June 19, 1963. Committee hearings in the Senate essentially went nowhere. In the House, the bill was referred to Subcommittee No. 5 of the Judiciary Committee, which held hearings in the summer of 1963.]

The key to achieving that bipartisan support was the senior Republican on the House Judiciary Committee, William McCulloch from Piqua, Ohio, a long-time member of Congress with eminent conservative credentials but a firm, sincere commitment to civil rights. From the beginning, then, the administration focused not only on the Judiciary Committee Democrats under the chairmanship of Emanuel Celler from Brooklyn but also on Congressman McCulloch.

The administration strategy was dramatically different from that which most House supporters of civil rights were familiar with from their experience in 1957 and 1960. In those years the House Judiciary Committee had passed a very strong civil rights bill which was then weakened on the floor of the House. Even so, when it left the House it still carried enough strength so that negotiations looking to a workable compromise could take place in the Senate. In short, the 1957 and 1960 strategy called for the Judiciary Committee to report the strongest possible bill and thus provide negotiating room on the House floor and later in the Senate.

The Kennedy administration's new and different approach left northern liberals dubious and critical of the administration's negotiations with House Republicans, some of whom also thought the strategy was unwise. Doubts grew into liberal Democratic rebellion and, after preliminary agreements between the administration and McCulloch, there were two potentially fatal explosions in the Judiciary Committee. The first came in the subcommittee considering the bill, where the liberal Democrats (who were a majority on that subcommittee but on no other relevant body in the House) suddenly wrote a much more powerful bill and promptly reported it to the full Judiciary Committee. These liberals, strongly supported by the umbrella lobbying organization, the Leadership Conference on Civil Rights, sincerely believed that it was necessary to proceed as in 1957: make the bill as strong as possible initially in order to have provisions that could be bargained away later in the legislative process.

Representative McCulloch, having reached an understanding with the administration, not unreasonably thought that he had been double-crossed by the administration in league with the rebellious liberal Democrats. He threatened to refuse to cooperate in removing the provisions added to the subcommittee bill that were most objectionable to Republicans. The administration agreed to his conditions for an arrangement by which the full Judiciary Committee would trim the subcommittee bill. But then, in mid-October this plan blew up in the full committee and the Southerners immediately tried to exploit the fiasco by supporting a move to report the strong bill out of the committee.

The administration felt that once the bill came before the full House, it would have little support from Republicans and would die. McCulloch's suspicions were overcome once again and at the end of October an agreement was reached with him and the Republican House leader, Charles Halleck, to support a bipartisan bill both in the committee and on the floor.

The bill was now considerably stronger than the version President Kennedy had sent to Congress in the summer. The biggest change was the addition of Title VII, which required non-discrimination in employment. Except for one important addition on the House floor [the addition of sex as a prohibited basis of discrimination in employment was the result of an amendment offered by Representative Howard Smith of Virginia, the leader of the conservative Southern Democrats, who hoped that his proposal would so overload the bill as to cause it to fall], the committee version of the bill was essentially the one that became the Civil Rights Act of 1964. There was much argument. There was much heat about a host of other provisions, but in terms of long range substantive impact, that was the measure passed by the House (in February) on which cloture was invoked and was ultimately passed by the Senate.

From the very beginning the administration's fundamental strategy was to position and focus the bill in a way designed to overcome a filibuster in the Senate. Happily, the plan succeeded.

Stephen Horn: I would like to mention a book by a colleague who was on Senator Kuchel's staff during this period: Dr. Robert D. Loevy, now Professor of Political Science at Colorado College. He is author of a book called *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964* (1990).

I had to leave this fight on about May 15, 1964 because Senator Kuchel came to me one day and said, "My boy, you have been trying to save humanity for a year; now it is your turn to try to save the Republican Party. Go to California and see if you can bail out Nelson Rockefeller." Senator Kuchel was chairman of the Rockefeller campaign in California, but as co-floor leader with Senator Humphrey and Republican Whip, he could not leave the Senate during this period. We failed to bail out Nelson Rockefeller; Goldwater won. [Senator Goldwater's narrow defeat of New York Governor Nelson Rockefeller in the California primary guaranteed him the Republican presidential nomination.] I did not come back to Washington until after the 1964 Act was approved.

Let me try to set the mood for what many Republicans and some Democrats felt when the Kennedy legislation was sent to the Senate in 1963. I am going to go back a few years before that.

Andrew Young talked about writing legislation through action and he certainly is right. Nothing would have happened without Birmingham. The Kennedy administration did not ever seem to want to get off the blocks. We were all bothered by the attitudes held in the top levels of the White House and by the Attorney General. Particularly in our craw on the liberal Republican side was Bobby Kennedy's first recommendation for the federal judiciary, one Judge Harold Cox, Mississippi Senator Jim Eastland's law partner. The Kennedys were constantly buying peace with the southern Democrats.[4] Cox called black Americans "niggers" from the federal bench. Needless to say, that appointment upset us and we did not trust them, to put it very simply. That did not mean that there were not good personal relationships between President Kennedy and Senator Kuchel. There were. They were both fond of each other. President Kennedy and Senator Dirksen were also very fond of each other, but we just did not trust the political milieu when it came to civil rights. And, very frankly, between 1960 and 1964 neither did a brave band of Democrats on the Senate side.

Repeatedly, there would be a meeting of Humphrey, Douglas, Clark, and Hart for the Democrats, along with Kuchel, Case of New Jersey, Javits, Keating, Scott, Cooper, Saltonstall, and occasionally somebody else from the Republican side depending on the issue. They would get together and moan about what was not happening, have Nick Katzenbach come up or Assistant Attorney General [Civil Rights Division] Burke Marshall, both of whom did an outstanding job in the passage of the 1964 Act and, occasionally, the Attorney General when we could get him in the room.

We were well aware of what the U.S. Commission on Civil Rights was doing. This was the one part of the 1957 Act under Eisenhower that had continued. They had done an outstanding job in putting together the basic legal framework that ought to be adopted if you were going to solve some of the problems in this country. Their 1961 reports were classic: *Voting*, *Education*, *Employment*, *Housing*, and *The Administration of Justice*. The Commission also got into public accommodations. Those reports were taken by the staff of John Lindsay (R., N.Y.) in the House and the Javits staff in the Senate, with several of us kibitzing because I like other people to do the work. The legislation suggested by the U.S. Commission on Civil Rights was the basis for the proposals offered by a group of Republicans on both sides of the Capitol. This program—and the advocacy of it—served as a constant needle to the Kennedy administration.

You will all remember President Kennedy's comment in the 1960 campaign—With "a stroke of the presidential pen" he was going to have housing discrimination banished by executive order. You will all remember that a few months after Kennedy's inauguration, Washington never had so much ink sent to it from the rest of the United States as blacks started to send in bottles of ink and pens and write "Mr. President, your pen must be dry." There was great frustration. When the nonviolent demonstrations in the South were met by murder and assassination attempts, that just fed the fires, increased the frustration of many in the Senate. So when finally a bill, modest as it was, was pressured out of the administration by the grassroots demonstrations plus occasional nagging from the Hill, we settled down to say that we are going to get this measure passed and we are going to strengthen it in the process.

It happens that I have carried in my wallet for 26 years the card that I wrote out at lunch with Senator Kuchel on June 19, 1963, approximately one year before the Senate vote on the Civil Rights Act of 1964. At that luncheon, we listed who on the Republican side would vote for cloture, who would be against, and who would need work. I said that it will take about a year to do the job. We missed it by two votes. Every one of the 18 we said would vote for cloture, we got. Most of the "need work" senators we got. We missed it by two when actually Karl Mundt (S.D.) and Norris Cotton (N.H.) helped us on cloture. We thought they would go against.

What it took was work on a handful of senators. You have heard it mentioned here: The religious community and the Leadership Conference on Civil Rights did a tremendous job. When we learned that a senator planned to go home, we would phone Jim Hamilton at the National Council of Churches and a Methodist bishop would just happen to show up when he got off the plane. We kept on a card the religions of the "need work" and the "probably against" senators. We felt this was a moral issue. You would have to appeal to a senator's conscience and, for some, you would also have to provide a tent under which to hide. The tent was provided by Everett McKinley Dirksen, the Republican leader of the senate.

We were writing legislation through inaction on the Senate floor and a lot of action behind the scenes. The real development of the bill on the Senate side was in the Capitol offices of Hubert Humphrey, Everett Dirksen, and Mike Mansfield, the Democratic leader—primarily in the Humphrey and Dirksen offices. Those were the three locales where over many months the staff and/or members of Justice and/or United States senators floated in and out one or two or a few at a time.

From the beginning, when Senator Kuchel and I met on June 19, 1963, we were convinced that Everett McKinley Dirksen would be for the bill. Dirksen had a pattern and a practice, if you will, in approaching the review of major legislation, and that was to have his three counsels thoroughly review each line in the legislation that became the Civil Rights Act of 1964. He also had a pattern and practice of bailing out key measures for both Republican and Democratic presidents. Dirksen was one of the great legislators of the mid-century in this country.

Some of you might recall his years in the House. When he went there in 1933 from Pekin, Illinois, a district that used to be part of Abraham Lincoln's district, Everett Dirksen was quite a New Deal supporter. He wanted to do something about the Depression. He was an activist. Indeed, from the beginning Everett Dirksen was a national legislator. He was not a parochial legislator.

Many people only saw the caricature side of Everett Dirksen. There was no senator more serious about the study of legislation than Everett Dirksen. I remember after several years as whip of the Republican party in the Senate, Senator Kuchel used to be in absolute frustration at colleagues much senior to him who did not even understand the basic rules of the Senate. We have very few rules in the Senate compared to the House. You can

Sen. Thomas Kuchel (left) and Senate Minority Leader Everett Dirksen, January 1963. AP/Wide World Photos.

read them, or at least listen and know how they operate. Too many senators did not care or did not take the time or were off somewhere issuing a press release or making a speech. Everett Dirksen had long ago mastered the House and Senate rules. He had long ago had a practice which he followed daily—I suspect until the day he died—and that was of reading line by line the legislation that was going to be before him. When his chauffeur-driven car took him out to his home in Virginia in the evening, you would see the light on in the back seat and Dirksen reading bills under that light. He knew what was in those bills. He knew where the weaknesses were. Many of the other senators simply were briefed by their staff. Senators develop a good ear. They pick the gist of issues rapidly and many are glib. But start asking many of them in depth, and they do not know. Everett Dirksen knew.

Much like Lyndon Johnson, Dirksen also knew what the frailties and weaknesses of his colleagues were. Now there is no question that there was a conscious strategy by the pro-civil rights forces, be it Humphrey, Kuchel, or now-President Lyndon Johnson—and Mike Mansfield certainly—and that was also true the next year in the Voting Rights Act of 1965, that "Everett Dirksen needs to be constantly massaged," to let him know that the whole burden of passage is on him, and that "this is his moment in history." There was a lot of massaging but I think the reality is that Everett Dirksen knew exactly what everybody was doing. He decided that he would enjoy it but he also always knew what he was going to do.

Early on, Senator Mansfield, the Democratic leader, and Senator Dirksen, the Republican leader, met privately. Both agreed that for the good of the country, a civil rights bill had to be cleared through the Senate. The question was, "How do you do it?"

We have heard some of the things that were done to achieve passage. There were also dozens more. With Dirksen for the Civil Rights Act, conservative Republicans from the Midwest and the Mountain States of the West who had few blacks in their constituencies, could vote for the bill and have a conservative tent to hide under. They could say, "Why, Dirksen did it." Dirksen was perceived by most Republicans out in the hinterland as a fairly conservative person.

When you look at a roll call vote analysis of how senators voted in terms of commitments based on the 1960 Republican platform, however, you see that Dirksen was no Goldwater. On 25 GOP platform issues which came before the Senate (and Senator Humphrey later used some of this in his acceptance speech at the Democratic Convention in 1964, John will remember), Republican Whip Kuchel had voted for the platform 25 times. Dirksen had voted against the 1960 platform only four times. Senate Republican Conference Chairman Leverett Saltonstall had also been opposed four times. Senator Bourke Hickenlooper, who nobody ever said was a flaming liberal, voted against the platform eight times. But Barry Goldwater voted against the platform on *all* 25 occasions.

Dirksen knew the voting habits of his colleagues. When Republicans and Democrats showed their frustration and asked: "Why can't we get this cloture thing up?" Dirksen would keep saying "time." He was right. It took time. Dirksen knew that the California primary was June 2. Barry Goldwater had privately told him that he would vote against cloture and indeed, he later told him he would vote against the bill. Dirksen tried to argue him out of it for the sake of the party, for the sake of himself. Goldwater would have none of it. Dirksen made sure no vote on cloture occurred before June 2 because there would be one or two or three or four Republicans that might say, "Gee, if Barry is doing it, we better be there to protect him." Dirksen was wily. He was a great American statesman.

Dirksen's relationship with Kennedy was also unusual. When Jack Kennedy was a young, somewhat naive senator recovering in pain in a hospital in the mid-1950s, Dirksen was writing him letters and telling him what was going on in the Senate.

When Lyndon Johnson took office, they had had a long established relationship from the House side as well as the Senate side because they worked together as Senate leaders from 1959 until Johnson assumed the Vice Presidency in 1961. After he became President, Johnson called him up and said, "Ev, I hope we can do things on a

nonpartisan basis." Dirksen was hurt that Johnson had called him. He said in essence, "Of course, Mr. President, you know that I will do things for the good of the nation."

So you had in Dirksen a person who without question was key. When he became leader in 1959, it was a minority party in chaos. He had changed the attitude of some in the Republican party in the Senate in many ways. Dirksen did little things like giving each Republican colleague a set of cufflinks that he had specifically designed. He brought the Republican senators together for Monday luncheons of the Policy Committee and would carefully go through key bills. That was typical of what he did on the civil rights bill. The Democrats were briefed by their floor staff in about 15 minutes. No problem with most of the Democrats except for the Southern Democrats. For the Republicans, it took 10 days of meetings as Neal Kennedy, Dirksen's chief counsel, read the bill to them line by line. The aim was to get on board the five or six we had to add to the 18 we knew we had from the beginning in order to secure cloture on the filibuster by the Southern Democrats.

That cloture vote was uncertain right down to the wire. The night before cloture, Senator Humphrey worked until midnight with three Democrats: Cannon of Nevada, Edmondson of Oklahoma, and Yarborough of Texas. He did not know what they were going to do when he went to sleep that night. The next morning they told him that they would vote for cloture, which was certainly a plus which made his day.[5]

So Dirksen gets the highest credit. But also important was the cooperation on a bipartisan basis of the leadership staff and the fact that we had Democratic and Republican floor managers for every title in that bill. Immensely helpful was the fact that John Stewart and Ray Wolfinger put out a newsletter that kept all the supporters and potential supporters informed. That had never happened before on a daily basis.

We had our share of flub-ups. You always will. Some of them came from the pro-civil rights side. Some of them came from the anti-civil rights side *after* cloture. All of our energies had been focused on securing those 67 cloture votes. We always knew we had the votes to pass the civil rights act. That was no problem. The problem was: How do you get two-thirds of the senators present and voting to shut off debate? The filibuster had been the southern weapon. It had proven to be successful time and time again in blocking or weakening House-passed civil rights measures. But nobody was really prepared for what you do after cloture was achieved. The ball game was almost lost both by the Humphrey-Kuchel side and then the Russell side, which was equally unprepared. It reminded me of student revolts—the experience is very heady, but what do you do when you win?

Fortunately, through errors made by North Carolina's Sam Ervin, "the country boy from the Harvard Law School," as to the place in the bill where he attached his amendments, he failed to gut the bill. He almost did, unbeknownst to the rest of the Senate, who had not quite seen what he had done yet.

So, I would say that the passage of the Civil Rights Act of 1964 was one of the most successful legislative efforts in the history of the Senate. Everyone involved knew that they were participating in a small way in a major moment in history.

A comment by Senator Mansfield perhaps sums up the role of Everett McKinley Dirksen. Mansfield's comment was in relation to the Voting Rights Act of 1965—a bill that was written in toto in Dirksen's Capitol office. Several of us participated in those sessions, which featured Dirksen's three counsels and representatives of the Department of Justice. Dirksen would come in every day about four o'clock and query: "Well, boys, what have you done today?" He would be briefed and then he would say, "Well, let's open the bar." Then one or two conservative Republicans would drop by and between the banter, wooing occurred. One day, Dirksen was told that we were through. He said to Glee Gomien, his secretary, "Get me the President." He got on the line while we were there and said, "Lyndon, you now have a bill that you can send to the United States Senate." Since the New Deal, the Voting Rights Act of 1965 was one of the few major bills drafted in the Senate prior to submission by the administration. In the process, the votes had been lined up.

When it came time to announce what had happened, an aide asked Democratic leader Mansfield, "Why don't you take a more active, upfront role in these press conferences where Senator Dirksen is center stage?" As you know, Mansfield would sit there puffing his pipe, with an occasional "yep," "nope," "yes," "no," and so forth. Finally he turned to the aide who was worried that he was not more active and said, "Let Everett have his day. After all, when it is all done and passed, it will be known as the President's Voting Rights Act." That was Mansfield's philosophy. That takes a lot of forbearance. It takes a lot of burying of ego but that happened on all fronts in order to get the job accomplished.

Raymond E. Wolfinger: What I will say comes primarily from interviews after the event rather than observations during the four months the bill was before the Senate. It might be useful to begin by being a little more explicit about the connection between the Birmingham demonstrations and the decision by the White House to proceed with serious legislation that would be taken seriously on the Hill—which President Kennedy's first

Police use hoses against civil rights demonstrators, Birmingham, Alabama, July 1963. AP/Wide World Photos.

civil rights bill in 1963 definitely was not. The connection is very simple: the Justice Department feared that the black community in Birmingham would get tired of being on the receiving end of white violence; and they were also afraid that Birmingham was just the beginning.

Even so, nobody should think that the Birmingham demonstrations led to a quick, open-and-shut decision by the administration. There were heated arguments among the President's closest advisers about how the administration should respond to Birmingham. The winning argument inside the White House was that if John Kennedy ran for reelection in 1964 with the country torn by racial violence, this would be no better for him than if he were to run for reelection of a country suffering a deep depression. The calculation therefor was that in order to avoid looking like a President who was presiding over a divided and violence-racked country, Kennedy had to take action that would at least seem to be a serious attempt to do away with the causes of the peaceful demonstrations that were being met with violence.

You might ask why Republicans would collaborate in an attempt to solve a problem that would embarrass the President. The Republicans arguing among themselves, particularly in the House, kept asking the same question. I've always been puzzled when I hear talk about "the Republican strategy," in view of what happened in those days and what Dave and I were told later by the Republicans whom we interviewed. The Republicans kept trying to work out how they should respond: Should we arrange things so that there is no civil rights legislation and the President running for reelection next year will be embarrassed? Can we get away with that? Should we pull his chestnuts out of the fire for him? During the course of the various blowups in the House Judiciary Committee described by David Filvaroff a few minutes ago, the Republicans constantly wrangled among themselves about whether they should allow President Kennedy to get the credit for solving the racial crisis. Each explosion in the Judiciary Committee seemed to open up the question all over again.

The main preoccupation of Republicans, and of Democrats, was: How will the credit and the blame be distributed for whatever happens? Now, of course, it is very difficult to figure this out when you don't know what is going to happen. People didn't really know what was going to happen, either to the civil rights bill or to race relations in the near future. The bill that passed was so much better from a civil rights standpoint than anybody had expected that even I.F. Stone, whose view of the American political system was decidedly jaundiced, wrote an ecstatic issue of his newsletter about what a wonderful piece of legislation this was. Everybody thought it was wonderful and very few people thought that as comprehensive and as strong a bill would pass.

So what was the Republican calculation about how to respond to this problem? As explained to us by the

Republican leader, Charles Halleck, and by other leading House Republicans, it was very simple: We don't know what the politically okay position on this bill is going to be. It is therefore better for the Republican party to be as united as possible. The calculations made by Republicans in the House, and I believe also in the Senate, were to some considerable degree to work out a series of compromises that could be supported by all Republicans except those who couldn't be expected to vote for civil rights under any circumstances.

I suggest that the real strategy of both parties was to develop a position for their respective parties such that when all was said and done there would be minimal risk of getting stuck with the blame, and the best chance of getting credit.

One part of Senator Dirksen's strategy is suggested by those aspects of Stephen Horn's remarks which pertain to suspicion of Democratic motives. In both the House and the Senate, the Republicans were very suspicious indeed of the real motives of the Kennedy administration and of the congressional Democrats. There are some quite explicit examples of this in the talks between Congressman McCulloch and Nick Katzenbach when the compromises that had been worked out between them kept blowing up because the liberal Democrats in the Judiciary Committee wouldn't stay on the reservation. After all, they were members of the majority party; why should they rubberstamp an arrangement made by their Deputy Attorney General and a leader of the opposition? It was only with great difficulty that a final compromise was worked out between the administration and the House Republicans. These final negotiations, like the previous ones, essentially excluded the House Democrats. As David Filvaroff has said, the bill did become stronger as a result of the liberals' rebellion.

When the Senate took up the bill, Senator Dirksen lay low for almost two months, then filed dozens of amendments. These ranged from the serious—gut Title I, gut Title II, gut Title III, and so on through the titles to proposals to change every other semicolon to a comma. I think that the purpose of this strategy was to see just how serious the Democrats were. If they started to show interest in any of the more serious threats to the bill, this would suggest to Senator Dirksen that maybe he had to be careful. After all, he did have some shreds of conservative ideology, and this was a bill that proposed to interfere with the free market. So if the Democrats seemed interested in his more drastic amendments, this would suggest to him that maybe he could do some damage to the bill. But if the Democrats remained steadfast, then he held the key to passage; which meant that he would get the blame if the bill failed.

To put it another way, by introducing such a range of amendments, Senator Dirksen could find out just how much he could trust the Democrats to stick to the fairly obdurate position taken by the Senate Democrats in general and specifically by the Justice Department in the negotiations and most specifically of all by my friend and collaborator, Dave Filvaroff, who was the actual negotiator for legions of senators.

Senator Dirksen learned that the strategy that he had to follow was a strategy of Republican unity because the Democrats were serious about the bill, something that they had not demonstrated in previous years, as John Stewart has suggested.

The irony of the 1964 Civil Rights Act is that, although the law itself was a great success, neither party got what it wanted politically from supporting the bill. For the Democrats, the bill was motivated by the Kennedy Administration's desire to soothe racial violence and therefore make the President look good running for reelection in 1964. The bill did not cause the riots in northern cities in the late '60s, but that racially-based urban unrest was—in addition to Vietnam—an issue that did in Hubert Humphrey in 1968. That is the Democratic irony.

The Republican irony is more obvious. Having in both the House and Senate, carefully, skillfully put together massive Republican votes for civil rights (the Republicans were much more united on the bill than the Democrats were), this all went for naught because one of the six

Republican senators who voted "no" happened to be the most important one of all from the standpoint of long-term party image, and that was Barry Goldwater. The Republicans had gotten 39 percent of the black vote in 1956 and 25 percent of the black vote in 1960, with a candidate by the way who was a member of the NAACP (a little-known fact about Richard Nixon). John Kennedy, on the other hand, had displayed little personal or political interest in civil rights.

In 1964, for all the efforts of Halleck and Dirksen and McCulloch, the Republican party got a five percent black vote, which has been about how the Republican party has done since then, because what set black America's image of the Republican party was not Halleck and McCulloch and Dirksen, but Goldwater. That is the irony of this act: neither party got what it hoped to get by supporting it.

Follow-up Remarks and Questions and Answers

Andrew Young: Just two things. I think that I have always tried to get the Republican party to take credit for what they did in the civil rights movement. It is even more generous than that because we could not have demonstrated had it not been for those Eisenhower-appointed judges in the South. The reason for the march from Selma to Montgomery was we had to get away from a Kennedy-appointed judge to an Eisenhower-appointed judge; so we marched the movement from Selma down the road to Montgomery because there was justice there.[6] That was one thing.

The other thing though—it wasn't race riots, it was police riots that got Hubert Humphrey in trouble. Once we taught police how to control tension without their generating violence, we haven't had violence much in this country. The difference is not that the conditions have changed—the conditions probably have worsened—but police have had more training and are more integrated. As far as the 1968 election is concerned, I think it was specifically Chicago.[7] Humphrey lost that election by I think one percent of the vote and given the kind of climate we had in Chicago, I almost left.

Question: Given the climate today and racism becoming even more entrenched and more difficult to deal with, is there any way that the strategies of the 1960s can possibly reawaken the ferment about legislative reform, or do we have to look somewhere else?

Andrew Young: The strategies of the sixties were appropriate to the sixties and particularly sixties type racism. I don't consider the kind of thing you have in New York now or even what we had up in Forsyth County, I don't consider that racism, I consider that hooliganism; hoodlums, blacks and whites, who are not ideologically motivated. They are thugs and every major society such as ours has thugs and I hate to condemn a whole society or whole people because of an action of some thugs. Interestingly enough, one of the things that made it possible for us to succeed was that the good people in the South didn't want to be associated with the thugs and the Ku Klux Klan types. Racism was not respectable in the South even in the sixties among well-educated people. In those days we thought that racism was a function of ignorance.

Ronald Reagan made racism very respectable and so we don't have people coming out very clearly against thuggishness. I think that is the issue that we face right now.

The other issue that we face I think is not racism either. It is simply the fact that our economy has not been able to end poverty for a significant percentage of people on the bottom of the ladder. There is a variety of reasons for that but only some of them are racial. I almost think that to be effective now you've got to get away from a race analysis of problems. Not that there are not racial implications in every problem but I don't think you solve them by dealing with them as race problems.

Question: I was intrigued by your references to the church part of the coalition. Today, one finds it hard to imagine this unified religious community. The liberal community, in particular, is now committed to a rhetoric of a very sharp separation between civil politics and a religious dimension. The world you are describing, for better and for worse, is a world we have lost, I think. The kind of consensual coming together of the civil and religious communities on behalf of this shared vision is a world which I do not think exists any longer.

Andrew Young: Well, it exists on South Africa. You can get those same churches united against South Africa and they are united to feed the hungry of the world. But I think that there are still numbers of issues around which the churches and the synagogues can develop consensus. Much of their energy in this last Congress was marshalled behind child care legislation which the Children's Defense Fund was advocating. The moral issues tend to change for them from time to time but there is still a consensus there.

John Stewart: There are a couple of people in the room who are better able to make this analogy than I, but one of the things I think that was also important in that period was a long liberal Protestant tradition of involvement in these kinds of issues. Reinhold Niebuhr was perhaps the most eloquent theologian who expressed that approach and he was joined by a growing liberal community among the Catholic bishops and among the Jewish religious leaders. Their commitments and their beliefs and their faith coincided with the political realities and

needs of that time. Obviously, immediately after that, the war came and that changed things dramatically. The kind of religious political traditions that grew out of that period in American Protestant thought came to fruition for a brief time in the civil rights movement. Some very good things happened because of it.

David Filvaroff: With respect to the role of the churches, we have again to cast ourselves back to the 1960s. Certainly the issue as framed was a moral issue. It was also an appeal to traditional American values. We were asked to confront the failure of the American promise in popular and constitutional and legal terms. The churches played a very important role and were able to reach both the general public and the Congress in ways that very few others could. The overall coalition was an unusually broad one and included traditional liberals, labor, and business groups. There were appeals to lawyers' groups on constitutional legal grounds. There was a national consensus as to the rightness of doing this—agreement everywhere except in the South. The arguments were about how, about what we ought to do, what the costs of doing it were. That context is a testament to the strength of the nonviolent movement as it came out of the South, out of Birmingham.

The other thing that made action easier—and this should not be forgotten—was that for the North it was cheap. The 1964 Civil Rights Bill was "beating up" on the South and things that were done largely in the South—openly done by the public, by business, by officials—with the sanction and approval of the law and of legal institutions. Only rarely in the course of the debates, the discussions, and the negotiations in the Congress, did people see some potential impact on how things were done in the North. When those things came up, they were very, very sensitive and the issues changed. There *was* national agreement and consensus and it wasn't an issue, moral or otherwise, just for church groups. It went well beyond that and that is what contributed to the strength of what we all recall as the power of the civil rights coalition. The issues now produce division, whether they be abortion, poverty, or civil rights.

Question: Do you see a way to re-introduce a moral vision or a personal self-examination that is related to political change?

Andrew Young: I think that one of the significant differences between the 1960s and the 1990s, and it was already happening in the sixties, was that the United States was no longer the total controlling power of the world. The sixties were also a time of global interaction, socially and economically. The visit of the leader of the Vietnamese Buddhists to Martin Luther King and a religious appeal that coincided with a chance plane ride between Cleveland and New York where Martin and Dr. Benjamin Spock ended up on the same plane happened in about a two-week period of time.

That was the beginning, I think, of Martin's deciding that he could not solve the problems of the poor. He was always committed to dealing with racism, poverty, and war. That was his Nobel Prize speech and he would have liked, I think, to concentrate on racism but the problem of the North was much more a problem of poverty than racism. Dealing with poverty costs money. He made a statement that the bombs we drop on Vietnam will explode at home. He saw the unemployment, the inflation, the neglect of our cities as a way in which our wartime economy impacted on our domestic agenda and he didn't think that we could solve these problems in isolation any more. In the nineties, I think that interdependence is even more apparent. We don't even have the money to solve our problems. Unless we can call on our friends in whom we invested a tremendous amount in the 1940s and 1950s, the Europeans and the Japanese, unless we can call on them to help us deal with the problems of poverty globally, I think we are going to have trouble dealing with some of the remaining economic problems that we face.

I think the academy is more important than the streets; we tend to forget that there was a lot of serious study that went into the 1954 Supreme Court decision out of Howard University and Yale and Harvard and the University of Pennsylvania. There must have been 20 different desegregation cases. I think the first were the *Sweatt* case in Texas and the dining car segregation cases. Almost every six months there was a different case so there was a solid intellectual consensus that had been built up in the forties and fifties that made it possible for us to act in the sixties in the context of that intellectual consensus.

One of the problems that we have in the nineties is that there is no intellectual consensus around which to act, so all actions tend to be fragmentary. I would like to see us have a much better understanding of poverty at home and abroad and the interrelationship between the two. Then there is a relationship between poverty and racism. The abortion issue is right at the heart of the question of poverty. Before I knew any ideology as a young preacher in South Georgia, I understood that the reason my members could not send their children to college, or the reason that they couldn't build a home or buy a truck was that every year they were having babies. So I had to start talking to women about planning their families. This was 40 years ago and the relationship between poverty and childbearing has always been there; and if you can't deal with that, you are not going to be able to deal with poverty. All of that leads into the drug situation. When you have women without husbands, children without male

Meeting of civil rights leaders, including Martin Luther King, Jr., with President Kennedy, 1962. UPI/Bettmann.

role models and authority figures at 10, 11, and 12, they are likely to go to the streets and start selling drugs.

The whole structure of poverty and the family is not just a question of Jim Crow. It was easy in Birmingham because Dr. Gaston, who was a millionaire who owned the insurance company, the hotel, the bank, and the funeral home, had to go to the back window at the Chinese restaurant to buy food. No matter who you were, if you had a Ph.D., you still could not vote, so there was a unanimity in the black community around race relations.

I'm not saying this as a putdown, but Thurgood Marshall did not approve of civil disobedience. He thought nonviolent demonstrations were dangerous to the long tradition of legal precedent that he had worked to establish through the NAACP. I was a college graduate and then had gone to graduate school and it never dawned on me that I should challenge a sign that said "white" on a restaurant. It took something, some kind of moral action, to make us challenge the system but the intellectual foundation had already been laid, as well as the legal foundation.

Stephen Horn: There are about four people that I want to name who really were significant on the side of this fight while Martin Luther King, Andy Young and others were engaged on the external side. One official of the Department of Justice who certainly had a key influence on Senator Dirksen was Burke Marshall, the Assistant Attorney General for Civil Rights. Marshall was a person who could be described as "quietly effective," if there ever was one. He was a person whom Senator Dirksen and all of us would listen to when he talked because Dirksen, who was a very competent lawyer himself, knew that Marshall was also a very competent lawyer.

Another individual who was walking the halls of Congress talking about civil rights before anybody else was walking those halls in modern times and who had the highest respect of Democrats and Republicans, and many conservatives as well as moderates and liberals, was Clarence Mitchell, Director of the Washington Office of the NAACP. He happened to be my first tutor when I went to the Hill because of what I had to prepare for with John's predecessor, which was the attempt by a bipartisan Humphrey/Kuchel coalition to change Senate XXII—the rule permitting cloture—at the beginning of the session in 1961 when we still had then-Vice President Nixon presiding as President of the Senate. He had ruled in our favor in 1959 that a constitutional majority of 51 could change the rules and not be subjected to a filibuster

at the beginning of a new Senate. He did so again in 1961. Lyndon Johnson did not rule in our favor in 1963.

Then, of course, there is President Lyndon Johnson. A lot of us viewed Lyndon Johnson with tremendous suspicion. He had gutted two civil rights bills as Senate Democratic leader. A majority of the Senate Republicans had supported Title III, which authorized the Attorney General to go into court in order to protect a wide variety of civil rights. A lot of them grumbled but they nevertheless overwhelmingly supported it. Johnson knocked Title III out in the 1957 Act that Attorney General Brownell and President Eisenhower had submitted. So we did not trust Johnson. But the fact is, Lyndon Johnson never refused a request to do anything any of the Senate leaders needed done to assure passage of the 1964 Act. If he had to make a call, he made a call. He stayed a little bit in the distance but he was constantly goading, I think, Senator Humphrey and others: "What have you done to call so and so?" And certainly with reference to Dirksen: "Go see him, go drink with him, go see him every day"—this kind of thing. Lyndon Johnson knew that the liberal Democrats such as Washington attorney Joe Rauh—another committed leader in this operation—were ready to slit his political throat if he slipped and I think all of us felt that Johnson would never sell us out on the 1964 bill. We felt that if Jack Kennedy, God bless him, had been alive he would have and he would have gotten away with it with charm. But coming up for the presidency, Lyndon Johnson could not afford to sell out civil rights with that southern accent.

Then there is Hubert Horatio Humphrey. If the Senate ever again starts adding portraits in the Senate Reception Room to the five great senators who are already honored on that wall, I would certainly put Hubert Humphrey at the top of the list. As with Dirksen, here was a national legislator. Here was the person who had not only to soothe the egos on the Republican and Democratic side but also the egos in the Executive Branch. He had to unruffle ruffled egos all over the place as he moved nimbly between all of those areas. This occurred at the time that there was great personal tragedy going on in his family where a child was very ill and other things that weighed heavily on him. Truly, Hubert Humphrey was one of the great national legislators of this century.

John Stewart: For whatever reasons, and we've hit upon a number of them, this was a dramatic example of where the system really worked. Some of us who came up and really felt that we were making a contribution, and had interesting and challenging roles in Washington at that time, were kind of spoiled by it. I guess I've never quite recovered from it. In the sense that here was an example of the system working—the Senate, an institution that was supposed to slow things down with the filibuster, two-thirds majority, and all of these things. And the institutional foundations of the Senate remained intact and they are still intact. Yet the kind of bill that no one ever thought could pass in fact did pass. For a variety of reasons: the House, the Senate, LBJ, the churches, Clarence Mitchell, Hubert Humphrey, Thomas Kuchel. For all of these reasons, the system worked. It produced a piece of legislation that materially changed the way we live in this country. Every now and then you scratch your head and say "My God, how in the hell did that happen and why have we lost the touch recently?" I don't presume to know the answer to that question. Every now and then it is useful to look back at that and remind yourself that by God it did work. If it worked then, maybe someday it will work again.

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1. In 1964 the filibuster was the southern senators' best weapon. Until 1964, no filibuster against a civil rights bill had ever been defeated. But a careful study of the historical record reveals that, "with one possible exception, in no case between [World War II] and 1966 was the filibuster responsible for the death of a civil rights bill supported by majorities in Congress." Raymond E. Wolfinger, "Filibusters: Majority Rule, Presidential Leadership, and Senate Norms," in *Readings on Congress* (Prentice-Hall, Inc., 1971), p. 304.
2. "Public accommodations" are hotels, motels, lunch counters, restaurants, and the like. Throughout the South, most such places did not serve blacks. This type of segregation was prohibited in most northern states. By the same token, many northern states had laws forbidding discrimination in employment. In much of the South blacks were kept from registering to vote by fraud, intimidation, or outright refusal. This disfranchisement, largely unaffected by the 1964 Act, was swept away by the 1965 Voting Rights Act, which sent federal officials to register voters.
3. Bourke Hickenlooper, an influential conservative Republican from Iowa, voted to impose cloture to stop the southern filibuster. He voted against final passage of the bill, which required only a simple majority.
4. James Eastland, a very conservative Mississippian, chaired the Senate Judiciary Committee at the time, which accounts in part both for the Administration's judicial nominations and the negligible role played by that committee in the passage of the Civil Rights Act. The Senate took up the House-passed bill in late February by putting it directly on its calendar for floor consideration, rather than referring the bill to the Judiciary Committee, which would have been the customary practice.
5. Seventy-one senators voted for cloture, four more than were needed. In addition, the proponents believed that, if his vote were needed, Senator Carl Hayden (D., Arizona) would have broken the habit of a lifetime and voted for cloture. Hayden voted for the bill on final passage.
6. Demonstrations about denial of the right to vote in Selma, Alabama early in 1965 led to introduction that year of the Voting Rights Act.
7. This statement refers to the forceful response by the Chicago police to the largely white street demonstrators during the 1968 Democratic convention.

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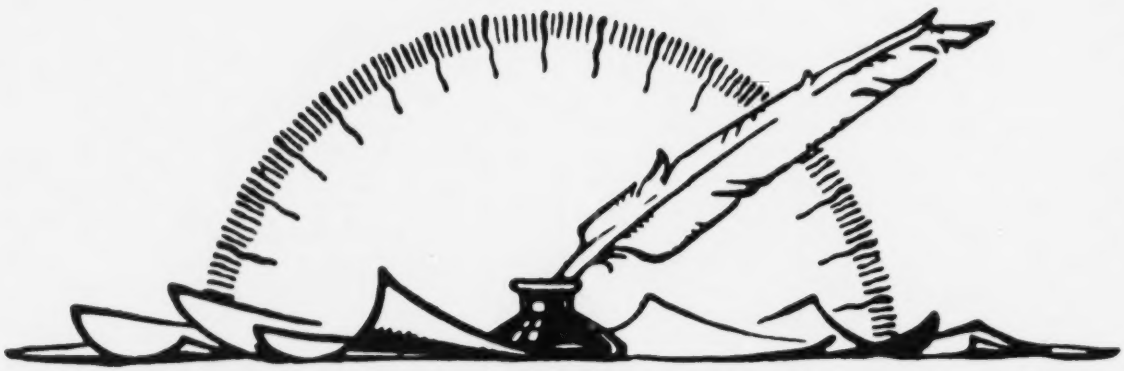
DOCUMENTS

Madison, Jefferson, and the Bill of Rights

by PAUL FINKELMAN

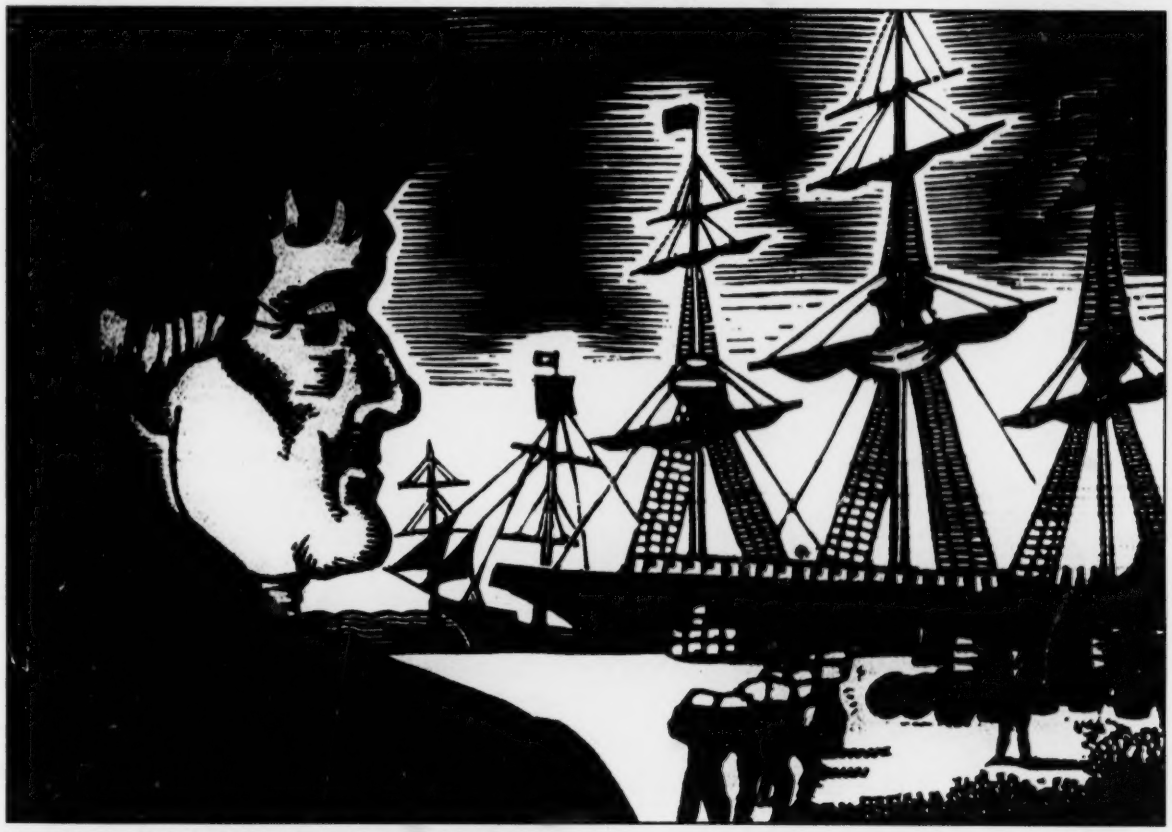


We know both James Madison and Thomas Jefferson for their sympathies for civil liberties and for their life-long political alliance. Their writings abound with eloquent statements about the importance of civil liberties to a free society. During the struggle over the Constitution, however, the two differed on the importance of a bill of rights. Madison wanted the Constitution ratified as quickly as possible, and with no amendments or changes. He saw little need for a bill of rights, which he derisively called a "parchment barrier." Jefferson, on the other hand, was a strong advocate of a bill of rights, which he believed was absolutely necessary for the preservation of American liberty.

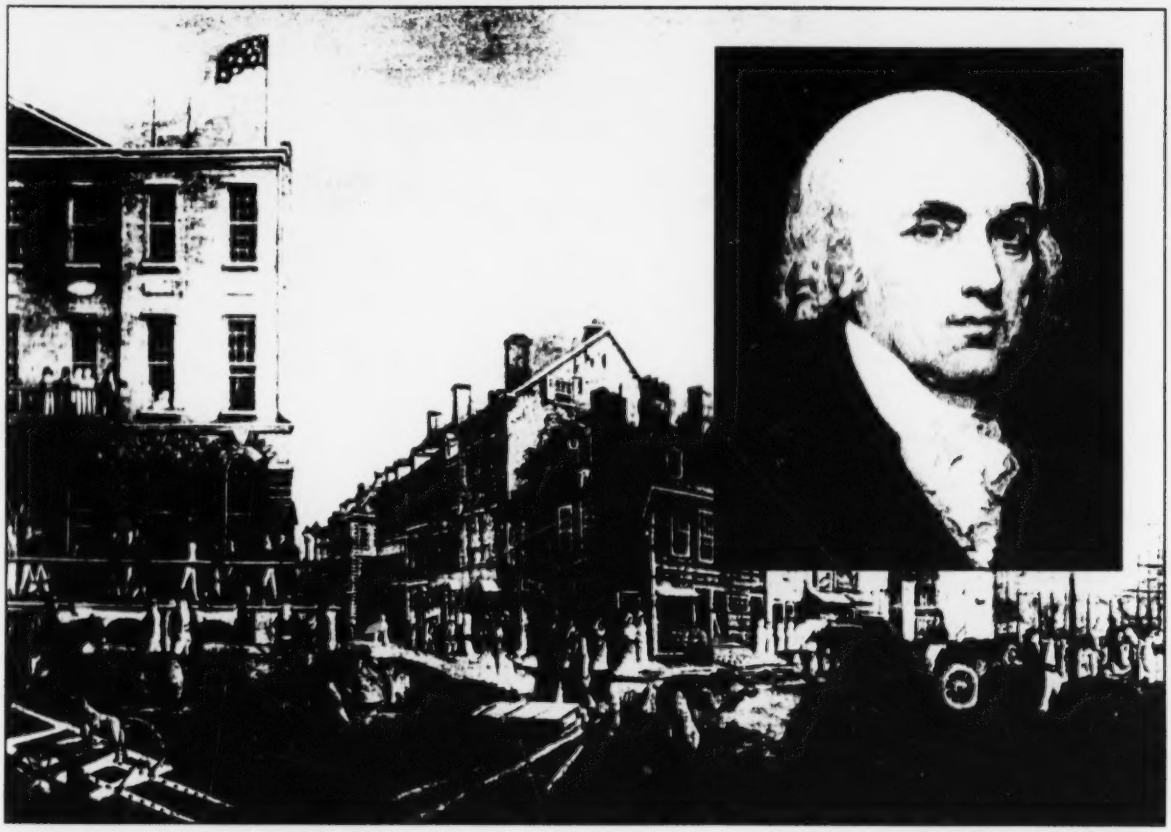
The conventional historical wisdom is that in his letters to Madison written from Paris Jefferson persuaded Madison to switch positions and support a bill of rights. But it is unlikely that Jefferson's letters had any direct effect on Madison's actions during the ratification process. Certainly in the short run they did not, because of the distance between the two men and the long time it took for letters to be exchanged. Jefferson's most famous letter on the need for a bill of rights was written on December 20, 1787, but Madison did not receive this letter until July 1788, after Virginia had ratified the Constitution and after Madison himself had announced his willingness to support future amendments.

While the Madison-Jefferson correspondence may not have had an immediate effect on Madison's decision to support a bill of rights, the correspondence is important for other reasons. Because of the many months that it took for letters to cross the Atlantic, Madison did not fear that his openness would have adverse political repercussions. Thus, this correspondence tells us what Madison really believed about the bill of rights. The letters confirm that Madison's opposition to adding a bill of rights was not simply tactical—to avoid any delay in the ratification of the Constitution—but that he truly opposed the adoption of a bill of rights in 1787 and 1788. The evidence suggests that Madison was converted to the bill of rights by political necessity rather than by Thomas Jefferson's arguments and that the conversion, such as it was, took place before Madison received Jefferson's letters urging the addition of a bill of rights.

In the long run, however, these letters may have had a profound effect on Madison. Jefferson's letters provided Madison with strong theoretical arguments in favor of a bill of rights. Moreover, these arguments came from a man Madison respected and liked, and with whom he usually agreed. Most advocates of a bill of rights during the ratification struggle were Anti-Federalists, unsympathetic to the new Constitution. But Jefferson was a close ally of Madison and at least a nominal supporter of the Constitution. His arguments must have forced Madison to reconsider more carefully his opposition to a bill of rights. Finally, and most importantly, this correspondence reveals the richness of the intellectual and political debate over the nature of the Constitution and the Bill of Rights. These letters show thoughtful men debating and discussing serious issues.



Thomas Jefferson, Minister to France, 1785–1789. Library of Congress.



Wall and Water Streets, New York City, 1790s. Library of Congress.

James Madison. Library of Congress.

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Shortly after the end of the Constitutional Convention Madison sent Jefferson a copy of the Constitution, along with a seventeen-page letter discussing the convention. In his discussion of the Constitution, Madison complained that the convention defeated a proposal to give the new government a "negative on the laws of the States." Madison thought that a congressional veto over state legislation was far more important to the protection of liberty than a bill of rights. He thought the limitations on the states in Article I, Section 10 of the Constitution, which he mentioned in this letter, did not go far enough to protect personal liberty from the actions of the states. Madison did not fear that the national government would trample on the liberties of individuals; rather, he worried that the national government would not be strong enough to carry out its functions. Indeed, Madison believed liberty was safer in a large republic than in a small one. Madison believed a multiplicity of interests, not a bill of rights, would protect fundamental liberties. Perhaps because of these views, Madison did not tell Jefferson that at the very end of the convention the delegates defeated a motion to add a declaration of rights to the Constitution. Madison voted with the majority against that proposal. Madison's only reference to the demand for a bill of rights comes at the very end of this letter, when he refers to the attempts by Lee and Dane in the national Congress to "embarrass" the Constitution by proposing amendments before sending the Constitution to the states.

James Madison to Thomas Jefferson
New York[,] Octr. 24, 1787†

. . .

[T]he great objects which presented themselves [during the Convention] were 1. to unite a proper energy in the Executive and a proper stability in the Legislative departments, with the essential characters of Republican Government. 2. to draw a line of demarkation which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them. 3. to provide for the different interests of different parts of the Union. 4. to adjust the clashing pretensions of the large and small States. Each of these objects was pregnant with difficulties. The whole of them together formed a task more difficult than can be well conceived by those who were not concerned in the execution of it. Adding to these considerations the natural diversity of human opinions on all new and complicated subjects, it is impossible to consider the degree of concord which ultimately prevailed as less than a miracle.

. . .

The second object, the due partition of power, between the General & local Governments, was perhaps of all, the most nice and difficult. A few contended for an entire abolition of the States; some for indefinite power of Legislation in the Congress, with a negative on the laws of the States; some for such a power without a negative; some for a limited power of legislation, with such a negative; the majority finally for a limited power without the negative. The question with regard to the Negative underwent repeated discussions, and was finally rejected by a bare majority. As I formerly intimated to you my opinion in favor of this ingredient, I will take this occasion of explaining myself on the subject. Such a check on the States appears to me necessary 1. to prevent encroachments on the General authority. 2. to prevent instability and injustice in the legislation of the states.

1. Without such a check in the whole over the parts, our system involves the evil of imperia in imperio. If a compleat supremacy some where is not necessary in every Society, a controuling power at least is so, by which the general authority may be defended against encroachments of the subordinate authorities, and by which the latter may be restrained from encroachments on each other.

. . .

†Spelling and punctuation appears printed here as in the original.

2. A constitutional negative on the laws of the States seems equally necessary to secure individuals agst. encroachments on their rights. The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects. A reform therefore which does not make provision for private rights, must be materially defective. The restraints agst. paper emissions, and violations of contracts are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark. Injustice may be effected by such an infinitude of legislative expedients, that where the disposition exists it can only be controuled by some provision which reaches all cases whatsoever. The partial provision made, supposes the disposition which will evade it. It may be asked how private rights will be more secure under the Guardianship of the General Government than under the State Governments, since they are both founded on the republican principle which refers the ultimate decision to the will of the majority, and are distinguished rather by the extent within which they will operate, than by any material difference in their structure. A full discussion of this question would, if I mistake not, unfold the true principles of Republican Government, and prove in contradiction to the concurrent opinions of theoretical writers, that this form of Government, in order to effect its purposes, must operate not within a small but an extensive sphere. . . . Those who contend for a simple Democracy, or a pure republic, actuated by the sense of the majority, and operating within narrow limits, assume or suppose a case which is altogether fictitious. They found their reasoning on the idea, that the people composing the Society, enjoy not only an equality of political rights; but that they have all precisely the same interests, and the same feelings in every respect. Were this in reality the case, their reasoning would be conclusive. The interest of the majority would be that of the minority also; the decisions could only turn on mere opinion concerning criterion; and within a small sphere, this voice could be most easily collected, and the public affairs most accurately managed. We know however that no Society ever did or can consist of so homogeneous a mass of Citizens. . . . In all civilized Societies, distinctions are various and unavoidable. A distinction of property results from that very protection which a free Government gives to unequal faculties of acquiring it. There will be rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest. In addition to these natural distinctions, artificial ones will be founded, on accidental differences in political, religious or other opinions, or an attachment to the persons of leading individuals. . . . If then there must be different interests and parties in Society; and a majority when united by a common interest or passion can not be restrained from oppressing the minority, what remedy can be found in a republican Government, where the majority must ultimately decide, but that of giving such an extent to its sphere, that no common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit. In a large Society, the people are broken into so many interests and parties, that a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority of the whole. The same security seems requisite for the civil as for the religious rights of individuals. If the same sect form a majority and have the power, other sects will be sure to be depressed. . . . As in too small a sphere oppressive combinations may be too easily formed agst. the weaker party; so in too extensive a one, a defensive concert may be rendered too difficult against the oppression of those entrusted with the ad-

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ministration. . . . In the extended Republic of the United States, The General Government would hold a pretty even balance between the parties of particular States, and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interest.

When the plan came before Congs. for their sanction, a very serious effort was made by R. H. Lee & Mr. Dane from Masts. to embarrass it. It was first contended that Congress could not properly give any positive countenance to a measure which had for its object the subversion of the Constitution [i.e. the Articles of Confederation] under which they acted. This ground of attack failing, the former gentleman urged . . . sending out the plan with amendments, & proposed a number of them corresponding with the objections of Col. Mason. This experiment had still less effect. . . .

In late December 1787, Jefferson received Madison's letter of October 24. Jefferson's thoughtful response, his famous letter of December 20, 1787, reflected quite different concerns about the Constitution. After detailing what he liked in the Constitution, Jefferson turned to "what I do not like." Jefferson's attack on James Wilson of Pennsylvania deserves some comment. Federalists, including Madison, argued that a bill of rights was unnecessary because under a government of limited powers the states retained jurisdiction over personal liberties. Wilson made such an argument in the Constitutional Convention, and later in a widely reported speech in Philadelphia on October 6, 1787. There Wilson declared "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States. . . ." This attack on Wilson is particularly ironic, since Jefferson could not know that Madison had taken positions against a bill of rights that were nearly identical to Wilson's.

Jefferson to Madison
Paris[,] Dec. 20, 1787

I will now add what I do not like. First the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, against monopolies, the eternal & unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land & not by the law of Nations. To say, as Mr. Wilson does, that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved, might do for the Audience to whom it was addressed, but is surely a gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms. It was a hard conclusion to say because there has been no uniformity among the states as to the cases triable by jury, because some have been so incautious as to abandon this mode of trial, therefore the more prudent states shall be reduced to the same level of calamity. It would have been much more just & wise to have concluded the other way that as most of the states had judiciously preserved this palladium, those who had wandered should be brought back to it, and to have established general right instead of general wrong. Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse or rest on inference.

In April 1788, Madison wrote Jefferson about the struggle for ratification. He had not yet received Jefferson's letter of December 20, and therefore did not know that Jefferson was strongly in favor of a bill of rights. This letter reveals that the private Madison was both hos-

tile to a bill of rights and annoyed by the Anti-Federalist demand for one. In the letter he accurately described the opposition in Virginia, and the problems for ratification posed by the demand for a bill of rights.

Madison to Jefferson
Virginia Orange [Co.], April 22, 1788

Mr. H_____y [Patrick Henry] is supposed to aim at disunion. Col. M_____n [George Mason] is growing more bitter, and outrageous in his efforts to carry his point; and will probably in the end be thrown by the violence of his passions into the politics of Mr. H_____y. The preliminary question will be whether previous alterations [amendments] shall be insisted on or not? Should this be carryed in the affirmative, either a conditional ratification, or a proposal for a new Convention will ensue. In either event, I think the Constitution, and the Union will be both endangered. It is not to be expected that the States which have ratified will reconsider their determinations, and submit to the alterations prescribed by Virg[ini]a. And if a second Convention should be formed, it is as little to be expected that the same spirit of compromise will prevail in it as produced an amicable result to the first. It will be easy also for those who have latent views of disunion, to carry them on under the mask of contending for alterations popular in some but inadmissible in other parts of the U. States.

Jefferson wrote this letter after he heard that New Hampshire had become the 9th state to ratify the Constitution but before hearing that Virginia had become the 10th state. Here Jefferson reiterates his belief in the importance of a bill of rights. His opposition to monopolies is primarily directed at government sponsored financial monopolies and franchises, but later in the letter seems to include patents and copyrights as well. This suggestion is particularly interesting, coming from an inventor and author.

Jefferson to Madison
Paris[,] July 31, 1788.

I sincerely rejoice at the acceptance of our new constitution by nine states. It is a good canvas, on which some strokes only want retouching. What these are, I think are sufficiently manifested by the general voice from North to South, which calls for a bill of rights. It seems pretty generally understood that this should go to Juries, Habeas corpus, Standing armies, Printing, Religion & Monopolies. I conceive there may be difficulty in finding general modifications of these suited to the habits of all the states. But if such cannot be found then it is better to establish trials by Jury, the right of Habeas corpus, freedom of the press & freedom of religion in all cases, and to abolish standing armies in time of peace, and Monopolies, in all cases, than not to do it in any. The few cases wherein these things may do evil, cannot be weighed against the multitude wherein the want of them will do evil. . . . Why suspend the Hab. corp. in insurrections & rebellions? The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them. If the publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken & tried, retaken & retried, while the necessity continues, only giving him redress against the government for damages. Examine the history of England: see how few of the cases of the suspension of the Habeas corpus law have been worthy of that suspension. They have been either real treasons wherein the parties might as well have been charged at once, or sham-plots where it was shameful they should ever have been suspected. Yet for the few cases wherein the suspension of the hab. corp. has done real good, that operation is now become habitual, & the minds of the nation almost prepared to live under it's constant suspension. A declaration that the federal government will never restrain the presses from printing any thing they please, will not take away

the liability of the printers for false facts printed. The declaration that religious faith shall be unpunished, does not give impunity to criminal acts dictated by religious error. The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression. If no check can be found to keep the number of standing troops within safe bounds, while they are tolerated as far as necessary, abandon them altogether, discipline well the militia, & guard the magazines [ammunition storage areas] with them. More than magazine-guards will be useless if few, & dangerous if many. No European nation can ever send against us such a regular army as we need fear, & it is hard if our militia are not equal to those of Canada or Florida. My idea then is, that tho' proper exceptions to these general rules are desireable & probably practicable, yet if the exceptions cannot be agreed on, the establishment of the rules in all cases will do ill in very few. I hope therefore a bill of rights will be formed to guard the peoples against the federal government, as they are already guarded against their state governments in most instances.

By October 1788 eleven states had ratified the Constitution. Here at last Madison responded to Jefferson's letter of December 20, 1787, various intervening letters commenting on the need for a bill of rights, as well as to Jefferson's letter of July 31, 1788. Along with this letter Madison included a "little pamphlet" which contained the various amendments proposed by the state ratifying conventions. Madison thought that "As far as these may consist of a constitutional declaration of the most essential rights" it was "probable" they would be added to the Constitution. This led Madison to finally present his views on why a bill of rights was unnecessary for the Constitution. Madison remains skeptical about the value of a bill of rights—"parchment barriers"—but he also suggests some ways in which a bill of rights might be useful. In his December letter, Jefferson had attacked the position of James Wilson that a bill of rights was unnecessary because of the limited powers of the national government. Here Madison cautiously endorses Wilson's position. Madison begins by telling Jefferson he had always "been in favor of a bill of rights." This is, at best, an exaggeration. As his speeches, private correspondence, and public writings during the ratification period show, Madison had not in fact been in favor of a bill of rights. Madison's statement here probably reflects his lifelong support for personal liberty, rather than an attempt to accurately portray his most recent conduct.

Madison to Jefferson
New York[,] Oct. 17, 1788

My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice. I have not viewed it in an important light. 1. because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of Conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power. One of the objections in New England was that the Constitution by prohibiting religious tests opened a door for Jews Turks & infidels. 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case

of the State Governments, and exists in no other. 4. because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the rights of Conscience it is well known that a religious establishment wd. have taken place in that State, if the legislative majority had found as they expected, a majority of the people in favor of the measure; and I am persuaded that if a majority of the people were now of one sect, the measure would still take place and on narrower ground than was then proposed, notwithstanding the additional obstacle which the law has since created. Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to: and is probably more strongly impressed on my mind by facts, and reflections suggested by them, than on yours which has contemplated abuses of power issuing from a very different quarter. Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince. . . . The difference so far as it relates to the point in question—the efficacy of a bill of rights in controuling abuses of power—lies in this, that in a monarchy the latent force of the nation is superior to that of the sovereign, and a solemn charter of popular rights must have a great effect, as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community; whereas in a popular Government, the political and physical power may be considered as vested in the same hands, that is in a majority of the people, and consequently the tyrannical will of the sovereign is not [to] be controuled by the dread of an appeal to any other force within the community. What use then it may be asked can a bill of rights serve in popular Governments? I answer the two following which though less essential than in other Governments, sufficiently recommend the precaution. 1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion. 2. Altho' it be generally true as above stated that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter sources; and on such, a bill of rights will be a good ground for an appeal to the sense of the community. Perhaps too there may be a certain degree of danger, that a succession of artful and ambitious rulers, may by gradual & well-timed advances, finally erect an independent Government on the subversion of liberty. Should this danger exist at all, it is prudent to guard agst. it, especially when the precaution can do no injury. At the same time I must own that I see no tendency in our governments to danger on that side. It has been remarked that there is a tendency in all Governments to an augmentation of power at the expence of liberty. But the remark as usually understood does not appear to me well founded. Power when it has attained a certain degree of energy and independence goes on generally to further degrees. But when below that degree, the direct tendency is to further degrees of relaxation, until the abuses of liberty beget a sudden transition to an undue degree of power. With this explanation the remark may be true; and in the latter sense only is it in my opinion applicable to the Governments in America. It is a melancholy reflection

that liberty should be equally exposed to danger whether the Government have too much or too little power, and that the line which divides these extremes should be so inaccurately defined by experience.

Supposing a bill of rights to be proper the articles which ought to compose it, admit of much discussion. I am inclined to think that absolute restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public: and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy. Should a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the Hab. Corp. be dictated by the alarm, no written prohibitions on earth would prevent the measure. Should an army in time of peace be gradually established in our neighborhood by Britn: or Spain, declarations on paper would have as little effect in preventing a standing force for the public safety. The best security agst. these evils is to remove the pretext for them. With regard to monopolies they are justly classed among the greatest nusances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the Public to abolish the privilege at a price to be specified in the grant of it? Is there not also infinitely less danger of this abuse in our Governments, than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.

This is Jefferson's reply to Madison's letter of October 17. The two men still differ on the importance of a bill of rights. But their differences are narrowing. One aspect of this letter worth noting is that Jefferson argues in favor of a bill of rights because it will give power to the judiciary. This was probably not an endorsement of judicial review in the modern sense, but it does indicate Jefferson's understanding that the judiciary ought to have some role in protecting fundamental liberties.

Jefferson to Madison
Paris[,] Mar. 15: 1789.

Your thoughts on the subject of the Declaration of rights in the letter of Oct. 17. [sic] I have weighed with great satisfaction. Some of them had not occurred to me before, but were acknoleged just in the moment they were presented to my mind. In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, & kept strictly to their own department merits great confidence for their learning & integrity. In fact what degree of confidence would be too much for a body composed of such men as Wythe, Blair & Pendleton? . . . I am happy to find that on the whole you are a friend to this amendment. The Declaration of rights is like all other human blessings alloyed with some inconveniences, and not accomplishing fully it's object. But the good in this instance vastly overweighs the evil. I cannot refrain from making short answers to the objections which your letter states to have been raised. 1. That the rights in question are reserved by the manner in which the federal powers are granted. Answer. A constitutive act may certainly be so formed as to need no declaration as far as it goes: and if it goes to all material points nothing more is wanting. . . . But in a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary by way of supplement. This is the case of our new federal constitution. This instrument forms us into one

state as to certain objects, and gives us a legislative & executive body for these objects. It should therefore guard us against their abuses of power within the field submitted to them. 2. A positive declaration of some essential rights could not be obtained in the requisite latitude. Answer. Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can. 3. The limited powers of the federal government & Jealousy of the subordinate governments afford a security which exists in no other instance. Answer. The first member of this seems resolvable into the 1st. objection before stated. The jealousy of the subordinate governments is a precious reliance. But observe that those governments are only agents. They must have principles furnished them whereon to found their opposition. The declaration of rights will be the text whereby they will try all the acts of the federal government. In this view it is necessary to the federal government also: as by the same text they may try the opposition of the subordinate governments. 4. Experience proves the inefficacy of a bill of rights. True. But tho it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less. There is a remarkeable difference between the characters of the Inconveniencies which attend a Declaration of rights, & those which attend the want of it. The inconveniences of the want of a Declaration are permanent, afflicting & irreparable: they are in constant progression from bad to worse. The executive in our governments is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for long years. That of the executive will come in it's turn, but it will be at a remote period. I know there are some among us who would now establish a monarchy. But they are inconsiderable in number and weight of character. The rising race are all republicans. We were educated in royalism: no wonder if some of us retain that idolatry still. Our young people are educated in republicanism. An apostacy from that to royalism is unprecedented & impossible. I am much pleased with the prospect that a declaration of rights will be added: and hope it will be done in that way which will not endanger the whole frame of the government, or any essential part of it.

The Correspondence Concluded

During their year and a half of correspondence over the need for a bill of rights, eleven states ratified the Constitution and elected a new Congress. In running for Congress Madison promised his constituents that he would introduce amendments to the Constitution to protect fundamental rights. Madison still did not believe such amendments were necessary to protect liberty, but he did believe they would help secure support for the new government under the Constitution. In May 1789 Madison wrote Jefferson that "a Bill of rights ... will be proposed, with a few other alterations most called for by the opponents of the Government and least objectionable to its friends." In early June, Madison sent Jefferson a newspaper clipping which showed the amendments he had introduced. He subsequently told Jefferson that "every thing of a controvertible nature that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided." This rationale explained "the omission of several amendments" which Jefferson might have thought "proper." After a summer of debate and negotiation, Congress approved twelve amendments, ten of which were ratified by the states. Each state notified the secretary of state when the amendments had been ratified. Probably few duties of his job pleased the nation's first secretary of state more than when Thomas Jefferson was able to announce to the United States in March 1792 that the Bill of Rights had been ratified.

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What Americans Should Know About the Bill of Rights: Eight Lessons

by MARK P. PETRACCA

In June of 1789, Representative James Madison fulfilled a campaign promise to his Virginia constituents by asking colleagues in the House of Representatives to consider a group of constitutional amendments designed to secure basic individual liberties. By December of 1791, ten of these were ratified by the necessary number of states, becoming the first amendments to the new Constitution—the Bill of Rights.

The Bill of Rights has been variously described as "a shield to every American citizen," "the one guarantee of freedom to the American people," "fetters against doing evil which no honest government should decline," and "the foundation of liberty against the encroachments of government." However, even as we prepare to celebrate its bicentennial, ignorance, indifference, intolerance, ideology, and perhaps even modernity threaten the viability of its guarantees. Pulitzer Prize-winning historian Michael Kammen calls it a "subtle attack" while others see it as a direct frontal assault. For the past forty years, surveys have shown that Americans are uninformed about the provisions contained within the Bill of Rights, at best; and hostile to them, at worst. A study conducted in 1987, for example, showed that 59 percent of the American public could not even identify the Bill of Rights. Of greater concern is the "gray truth," as attorney Marvin E. Frankel puts it, that "civil liberties and civil rights are not very popular in the land of the free."

The complexity of problems we face as a post-industrial society makes the application of the Bill of Rights a difficult, but not an impossible, task. We may begin a defense against these modern assaults and a reaffirmation of the principles embedded in this document by identifying eight lessons that every American should know about the Bill of Rights.

1. The Framers of the Constitution originally opposed the Bill of Rights.

Ironically, James Madison and most other delegates to the Constitutional Convention in 1787 opposed the addition of a bill of rights to the Constitution and continued to oppose it during the subsequent ratification debates. Late in the Convention, on September 12, George Mason of Virginia and Elbridge Gerry of Massachusetts introduced a motion to preface the proposed Constitution with a Bill of Rights. While the convention voted unanimously against the proposal, four primary arguments were advanced to sustain opposition to a bill of rights by the Federalists. (1) It was unnecessary in a constitutional republic founded upon popular sovereignty and inalienable natural rights. In addition, since many (but not all) states had bills of rights, federal guarantees were not needed. (2) A bill of rights would be dangerous, for, as Alexander Hamilton put it in *Federalist*, 84: "They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. Why declare that things shall not be done which there is no power to do?" (3) It would be impracticable to enforce since its security would inevitably depend on public opinion, and on the general spirit of the people and of the government. (4) The Constitution is itself a bill of rights as is the constitution of each state, making further efforts to secure these rights redundant. The Constitution sets forth the division of power within the national government and between the national and state governments, guaranteeing many substantive rights. Additionally, as Hamilton explains, the body of the Constitution contains "various provisions in favor of particular privileges and rights which in substance" amounts to a bill of rights (e.g., regarding *habeas corpus*, judgment in cases of impeachment and treason, trial by jury, and prohibitions against bills of attainder or ex post facto laws, among others).

2. The Bill of Rights is the result of political pressure and compromise.

The absence of a bill of rights in the Constitution was a major obstacle to ratification and provoked some of the strongest protests by the Anti-Federalists in opposition to the proposed government. George Mason of Virginia refused to sign the Constitution, saying that without a bill of rights, he "would sooner chop off his right hand than put it to the constitution as it now stands." A writer who used the pen name "Agrippa" responded to the Federalists' defense of the Constitution by insisting that in a representative government a bill of rights was absolutely necessary "to secure the minority against the usurpation and tyranny of the majority." "A [Maryland] Farmer" was even more emphatic: "The truth is, that the rights of individuals are frequently opposed to the apparent interests of the majority—For this reason the greater the portion of political freedom in a form of government the greater the necessity of a bill of rights." Indeed, for "Brutus," it was "astonishing, that this grand security, to the

In 1943, the Supreme Court, citing freedom of speech and conscience, ruled that flag salutes must be voluntary. Photograph from the Library of Congress.

rights of the people, is not to be found in this constitution." Since the Federalists were not so completely convinced of the undesirability of a bill of rights as to prefer the defeat of the Constitution to ratification with an accompanying bill of rights, they agreed to support a bill of rights once the First Congress was assembled.

Madison's change of mind on this matter is arguably attributable to the Anti-Federalist composition of his congressional constituency. In order to be elected to the House of Representatives, Madison had to respond to the concerns of his constituency about the absence of a bill of rights. By October of 1788, Madison could admit to Jefferson, who was dismayed that the new Constitution did not contain a bill of rights, that he had found reason to concede that a bill of rights might be a prudent, if not an essential, precaution: "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment counteract the impulses of interest and passion."

Thus Madison justified the submission of a bill of rights to Congress on "declaratory grounds." Once these rights are declared and venerated by the people, as political philosopher Martin Diamond explains, they "serve as an ethical admonition to the people, teaching them to subdue dangerous impulses of passion and interest." This modern assessment echoes the ratification call for a bill of rights by "The Federal Farmer" in a letter of January 20, 1788:

> We do not by declarations change the nature of things, or create new truths, but we give existence, or at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot. If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book. What is the usefulness of a truth in theory, unless it exists constantly in the minds of the people, and has their assent. . . .

Of course, the value of declaration followed by veneration is lost if we are not well educated about the Bill of Rights and its contemporary implications for society.

3. Bills of rights are an American tradition.

Neither the idea for a bill of rights nor the substantive provisions contained therein emerged spontaneously from Madison's mind or from the insistent lobbying of the Anti-Federalists. Both stemmed from the English and American habit of making such declarations part of their fundamental law. It was common practice in the colonies for Americans to state their basic values and commitments as a society in one document such as a preamble and a bill of rights and in a second document to describe their form of government. Hence the frequently found separation between a declaration or bill of rights and a constitution.

Likewise, the question of which provisions were to be included in a federal bill of rights to protect individual liberties and limit the powers of government was answered by appropriating the experiences of English and American sources—a majority of its provisions had already been articulated in a variety of related English and American documents. The extent of this appropriation is summarized by Donald S. Lutz: "The ten amendments that form the Bill of Rights contain twenty-seven separate rights. Six of these rights, or about 20 percent, were first stated in Magna Carta. Twenty-one, or about 75 percent, were first found in colonial documents written before the 1689 English Bill of Rights. All but one (the Ninth Amendment) could be found in several of the state constitutions written between 1776 and 1787."

This discussion is not intended to detract from the unique character or contribution of the Bill of Rights to the quality of public and private life in the American republic. Rather, it necessarily reminds us that respect for individual liberty and suspicion of government are principles deeply rooted in the cultural and constitutional fabric of America's political tradition.

4. The Bill of Rights is an anti-majoritarian document.

The great constitutional rights contained within the Bill of Rights are protections against majority pressures and majority power. Too often we forget that the Bill of Rights is part of the constitutional framework which protects us from the tyranny of the majority when we are weak, helpless, or just outnumbered. The Bill of Rights is an attempt to curb what Jefferson called "elective despotism"—the potential for tyrannical and perverse policies emerging from the elected branches of government. Writing from Paris in 1789, Jefferson disapproved "the want of a bill of rights, to guard against the legislative as well as the executive branches of the government" in the Constitution. Likewise, when Madison introduced the amendments to the First Congress in 1789, he noted the fear of "abuse of the executive [and] . . . the legislative power," and stressed that the purpose was to "control the majority from those acts [against the minority] to which they might otherwise be inclined." As Supreme Court Justice Robert Jackson observed some 150 years later: "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

5. The doctrine of "selective incorporation" has only recently applied the Bill of Rights to state and local authorities.

Once the Bill of Rights was ratified in 1791, the Congress was forbidden to abridge free speech, press, religion, and so forth. However, state legislatures *could* abridge them (unless prohibited by their state constitutions)—and they did! If a case was brought in a federal court, the individual was entitled to have a fair, speedy, public jury trial, and to confront accusers; an accused person could not be forced to testify. If the case was in a state or municipal court—and most were—the individual was not protected by these provisions. Not until the Supreme Court utilized the "due process" clause of the 14th Amendment (passed in the aftermath of the Civil War in 1868), first in the 1890s and then more frequently in the twentieth century, were certain rights protected from invasion by local authorities.

This judicial doctrine is called "selective incorporation"—"incorporation" because certain rights are held to be incorporated within the due process clause of the 14th Amendment and therefore applicable to the states; and "selective" because the court retains the discretion of deciding which rights are in and which are not. Under this doctrine, for example, First Amendment protections of speech, press, and assembly were incorporated in 1925, 1931, and 1937 respectively; Fourth Amendment rights against illegal searches and seizures in 1949; Fifth Amendment rights against self-incrimination in 1964 and against double-jeopardy in 1969; Sixth

Amendment rights to counsel in 1963 and to a speedy trial in 1967; and Eighth Amendment rights to be free of cruel and unusual punishments in 1962. Alternatively, the Second Amendment right "of the people to keep and bear arms" has yet to be incorporated and thus made applicable to the states.

6. The Bill of Rights does not contain all of the amendments originally proposed by Madison.

Madison proposed a total of nineteen constitutional amendments to the House of Representatives. Of these, twelve were approved by the House and Senate and ten were eventually ratified by the states. The two amendments approved by Congress but not ratified included an amendment to establish the ratio of representatives to population for the House, and one requiring that no law changing the compensation of Senators and Representatives could take effect until an election of Representatives had intervened. This amendment would have made it impossible for Congress to give itself a pay increase *without* facing the electorate first—which has now become standard practice in that legislative body.

Of the remaining five amendments not approved by Congress, one stands out as significant. Madison proposed that: "No State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases." This would have applied much of the Bill of Rights to state authorities. The many advocates of states' rights present in the First Congress easily defeated this amendment in the Senate. As indicated above, the nation would have to wait until the twentieth century for the Bill of Rights to be extended to state and local authorities.

7. The Bill of Rights touches daily life in America.

The Bill of Rights is not just about court cases, landmark decisions, or judicial doctrines. It fundamentally influences the quality of public and private life in America. Under its protection we are able to criticize elected officials and non-elected bureaucrats without retribution or punishment. Most of us do not worry about unexpected intrusions or invasions of public authority in our private lives. In general, we speak and write freely and therefore are at liberty to think freely as well. We are comforted by the many freedoms it provides and at the same time are made complacent by their normality and certainty. Conversely, all too frequently we are angered by the use of the Bill of Rights to protect those in society who appear undeserving of its benefits. And sometimes, sadly, we fail to live up to the Bill of Rights, as when the government ordered the internment of Japanese-Americans during World War II, despite the absence of any evidence of wrong-doing.

A threat to the Bill of Rights and the nation awaits us if we fail to know and recognize the rights that it guarantees and their significance for life in America. Without declaration and acknowledgment, there can be no veneration or enforcement. The eventual evisceration of those individual liberties will be the result.

8. There are notable rights missing from the Bill of Rights.

There are probably a great many rights which citizens assume or imagine are contained in the Bill of Rights which are just not there. For example, the right to housing, public welfare, or employment are nowhere guaranteed in the Constitution. Freedom from hunger or impoverishment is not guaranteed by the Bill of Rights. Even the right of privacy is nowhere mentioned explicitly in the Constitution, although the Court has recognized that a right of personal privacy, or at least a guarantee of certain zones of privacy, is constitutionally protected (however troublesome the source of this protection remains). Most surprisingly of all, there is no constitutional right to education. This is a great irony, since education is the one capacity necessary for the enforcement of the Bill of Rights and essential to democratic governance. "I know of no safe depository of the ultimate powers of the society but the people themselves," said Thomas Jefferson in 1820, "and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power." As we battle for the soul of the Bill of Rights, this corrective is in great demand—but is one which the document itself cannot provide.

Why are these "positive rights" not found in the Bill of Rights? The rights contained in the Bill of Rights are what most modern political theorists and philosophers conventionally call "negative rights"—rights to be free from government interference, such as the freedom of speech and religion—and proce-

dural rights, such as those concerned with criminal prosecution and other legal action. Positive rights on the other hand, are rights to assistance of some kind—to food, health care, housing, education, or employment; or to state action to prevent or punish private citizens committing discriminatory acts against other private citizens. The Bill of Rights emerged out of an Anglo-American tradition which affirmed the natural law theories of John Locke and enumerated procedural guarantees consistent with the higher law tradition of Sir Edward Coke. Accordingly, the Bill of Rights combines political liberties (e.g., free speech in the First Amendment) with procedural guarantees (e.g., due process in the Fifth Amendment) to protect the individual against the power of the state. A declaration of "positive rights" was outside the philosophical framework of either Locke or Coke; was foreign to the political and constitutional experience of those who advocated the Bill of Rights; and perhaps most significantly, was not part of the essential rationale or purpose for the Bill of Rights in the first place, namely, to secure the rights of "man" against unwarranted intrusion by the government. At the time of its adoption, says historian Bernard Schwartz, "the Bill of Rights represented the high point of a courageous struggle to pass on the relatively new idea that the rule of law must forever stand as a check upon governmental power."

In short, while contemporary debate rages fiercely between libertarians and welfare rights theorists about the need for legally binding "positive rights," philosophical, experiential, and purposive constraints limited their consideration by the First Congress in 1789.

The Bill of Rights is not self-enforcing nor, as history has shown, can we always depend on the national government for its enforcement. Rather, enforcement depends on the vigilance and education of all Americans. As the renowned jurist Learned Hand noted: "Liberty lives in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it." The "spirit of liberty" which emanates from the Bill of Rights needs to be kept alive by each new generation of Americans. It is a spirit which can only be effectively nurtured by education, self-reflection, appreciation, and toleration. Writing in 1788, The Federal Farmer showed a prescient understanding of the requirements for freedom's preservation:

> Men, in some countries do not remain free merely because they are entitled to natural and unalienable rights; men in all countries are entitled to them, not because their ancestors once got together and enumerated them on paper, but because, by repeated negotiations and declarations, all parties are brought to realize them, and of course to believe them to be sacred. . . . I might shew the wisdom of our past conduct as a people in not merely comforting ourselves that we were entitled to freedom, but in constantly keeping in view, in addresses, bills of rights, in news-papers, &c. the particular principles on which our freedoms must always depend.

Thus, the Bill of Rights is more than a legacy to be preserved, honored, or celebrated; it is a vision of respect, tolerance, and humanity to be experienced and embraced in the daily web of life. To do less than this is to risk the disappearance of its inspiring message from the hearts of all citizens.

Suggested additional readings:

Diamond, Martin. *The Founding of the Democratic Republic.* Itasca, IL: F. E. Peacock Publisher, 1981.

Farrand, Max. *The Records of the Federal Convention of 1787.* Volumes I–IV. New Haven: Yale University Press, 1911.

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Lutz, Donald S. *The Origins of American Constitutionalism.* Baton Rouge, LA: Louisiana State University Press, 1988.

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Rossiter, Clinton, ed. *The Federalist Papers.* New York: New American Library, 1961.

Rutland, Robert Allen. *The Birth of the Bill of Rights.* Chapel Hill, NC: University of North Carolina Press, 1955.

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Storing, Herbert J., ed. *The Anti-Federalist.* Chicago: University of Chicago Press, 1985.

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For the Classroom

Abigail Adams on the Constitutional Rights of Women

by CORINNE WRIGHT

The following lesson comes from ***Ideas of the Founders on Constitutional Government: Resources for Teachers of U.S. History and Government,*** *edited by John J. Patrick, Director, Social Studies Development Center, Indiana University, 2805 East Tenth Street, Bloomington, Indiana 47405; (812) 855-3838. It has been edited for inclusion in* ***this Constitution.***

Objectives

Upon completion of this lesson, students are expected to:
1) identify and have a better understanding of the lack of legal rights of American women during the founding period of the United States;
2) analyze and appraise ideas about the constitutional rights of women in an exchange of letters between Abigail Adams and John Adams;
3) analyze and appraise ideas about denial of constitutional rights for women in a letter from John Adams to James Sullivan.

Preparing to Teach the Lesson

Read the essay by Linda K. Kerber, " 'Ourselves and our Daughters Forever': Women and the Constitution, 1787–1876," ***this Constitution***, No. 6 (Spring 1985): 25–34. Pay special attention to the primary documents used, especially the correspondence between Abigail Adams and her husband, John Adams.

Plan to spend at least three class periods on this Lesson.

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Opening the Lesson

Write the following lines from a popular women's rights song on the chalkboard. Sing it or play a musical rendition of it. Students could then sing it together to the tune of "The Wearin' O' the Green," an Irish folk song:

"T'is just one hundred years ago our mothers and our sires
Lit up for all the world to see the flames of freedom's fires.
Through bloodshed and through hardship they labored in the fight.
Today we women labor still for liberty and right.

Chorus:

"Oh, we wear a yellow ribbon upon our women's breast.
We are prouder of its sunny hue than of a royal crest.
'Twas God's own primal color, born of purity and light,
We wear it now for liberty, for justice and for right."

Ask students to identify and explain the main idea of this verse. Ask how this main idea pertains to the framing of the U.S. Constitution in 1787 and to subsequent constitutional history.

Inform students that the main point of this Lesson is to examine the legal status and constitutional rights of women in the founding period of the United States.

Developing the Lesson

Ask students to read the Lesson and prepare answers to the questions in the various sections of the Lesson. Tell them to pay particular attention to the documents in the Lesson. Allow sufficient time for students to read and prepare their answers to questions about the documents. The documents in this Lesson are listed below:

- Letter from Abigail Adams to John Adams, March 31, 1776.
- Letter from John Adams to Abigail Adams, April 14, 1776.
- Letter from Abigail Adams to John Adams, May 7, 1776.
- Letter from John Adams to James Sullivan, May 26, 1776.

Conduct a class discussion about the questions that follow the exchange of letters between Abigail Adams and John Adams. Extend this discussion to include John Adams' letter to James Sullivan. Require students to explain and support their answers with evidence in the documents.

Concluding the Lesson

Divide the class into two groups. Require each group to select a chairperson to manage the group's discussion and a panel of three reporters to summarize and communicate the group's ideas to the class.

Assign to Group I the task of interpreting and defending the position about women's rights in John Adams' letters to Abigail Adams and to James Sullivan, which are included in this Lesson.

Assign to Group II the task of interpreting and rebutting the ideas in John Adams' letters to Abigail Adams and James Sullivan.

After the two groups have completed their discussions of the assigned tasks, reconvene the entire class. Ask the three-member panel of reporters from Group I to report its position on John Adams' letter. Then have the Group II panel report its position on John Adams' letters. These reports should not exceed ten minutes.

After the two reports have been presented, open the discussion to the entire class. Ask class members to raise questions or make comments (critical or supportive) about the two panel reports.

Lesson

Abigail Adams and the Constitutional Rights of Women

In the spring of 1776, shortly before members of the Continental Congress in Philadelphia declared American independence from Great Britain, and eleven years before the 1787 Constitution was written, Abigail Adams, wife of future president John Adams, corresponded with her husband concerning the new government and the seldom-discussed issue of "women's rights."

What kind of person was Abigail Adams? What was the legal status of women in the America of her time?

Abigail Adams and the Status of Women in 18th-Century America

Born in Weymouth, Massachusetts in 1744, Abigail was the daughter of the Reverend William Smith, a Congregational minister, and Elizabeth Quincy Smith. Abigail had no formal schooling, but she learned much from her parents and was encouraged to select and read books in her father's large private library. Later, Abigail wrote in a letter to a friend that what she learned she "picked up . . . as an eager gatherer" rather than from "systematic instruction."

A highly intelligent person, Abigail's educational achievements, though informal, were unusual for a woman of her day. So was the active partnership she shared with her husband, who respected and admired her opinions and frequently sought out her views. She described herself as having an innate desire to be a "rover," but her sex denied her that privilege.

During Abigail's lifetime and for many years to follow, women were expected to stay in the background rather than on the center stage of political and societal activity. At the time of the Constitutional Convention in 1787, women had few legal rights and economic opportunities. Females were barred at least by custom from most occupations. They were not allowed to vote or serve on juries. Married women could not manage property, make binding contracts, sue in court, nor could they act as the legal guardians of their children. Public opinion frowned upon women speaking in public.

Under English common law, the model for American lawmakers, husband and wife were treated legally as one person, and the husband was definitely in the driver's seat! Any money or land a woman possessed became the property of her husband once she married. Dr. Benjamin Rush once warned a young female that there would be "no will of your own when you marry."

A married woman gave up all individual status and kept no legal right to her own earnings or even her personal belongings. The husband was held responsible for supporting his wife and paying her debts. Men simply believed that women were not capable of handling business affairs.

Most women of the founding period of the United States lived in a rural culture based on an agricultural economy. In the typical "woman's domain," daily activities took place within a feminine, domestic circle. There was much local isolation, political apathy, and very little literacy among both men and women. Men discussed politics in terms that largely excluded women. The woman's role was defined by society as being primarily in the home.

Under the law of *coverture*, a married woman's property was under her husband's control during the life of their marriage. State legislatures sent mixed messages about male and female political behavior. There were different standards for the two sexes. Women, married or single, were responsible for acts of espionage or treason and were subject to full penalties under the law. Yet a married woman could make no political choices of her own. Indeed, a married woman was "covered" by her husband's civic identity. She lost the power to act independently, yet remained an independent moral being under the law, quite capable of committing and being tried for crimes. Unmarried women with property should have been excluded from such treatment, but custom usually prevailed. Single women were frequently treated no better than their married counterparts.

Safeguards for women's control of property, such as married women's property acts, preservation of dower rights, and certainly laws concerning divorce (it was almost impossible for a woman to seek divorce), were in the future of American women. These rights and privileges were not part of the founding period of the United States.

An Exchange of Letters Between John and Abigail Adams

During the Revolutionary War, issues of human rights were raised to the forefront in public debates. And so it was in the Continental Congress, where in the spring and summer of 1776, participants discussed the

"inalienable rights" of individuals and the possibility of declaring independence from Britain. A prominent member of the Continental Congress was the husband of Abigail Adams—John Adams of Massachusetts. From the end of March until early May 1776, Abigail and John Adams corresponded regularly. Read the excerpts from the three letters below and prepare to discuss the main ideas about women's rights in these letters.

Abigail Adams to John Adams
March 31, 1776

I long to hear that you have declared an independency [A Declaration of Independence for the United States of America, which was formally issued in July 1776]—and, by the way, in the new code of laws [constitution], which I suppose it will be necessary for you to make, I desire you would remember the ladies, and be more generous and favorable to them than [were] your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If particular care and attention is not paid to the ladies, we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.

That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute. But such of you as wish to be happy willingly give up the harsh title of master for the more tender and endearing one of friend. Why, then, not put it out of the power of the vicious and Lawless to use us with cruelty and indignity . . . ? Men of sense in all ages abhor those customs which treat us only as the vassals of your sex. Regard us then as Beings, placed by providence under your protection, and in imitation of the Supreme Being make use of that power only for our happiness.

John Adams to Abigail Adams
April 14, 1776

As to your extraordinary Code of Laws, I cannot but laugh. We have been told that our Struggle [the rebellion against Britain] has loosened the bands of Government everywhere. That Children and Apprentices were disobedient—that schools and Colleges were grown turbulent—that Indians slighted their Guardians and Negroes grew insolent to their Masters. But your Letter was the first intimation that another Tribe [women] more numerous and powerful than all the rest [had] grown discontented. This is rather too coarse a Compliment, but you are so saucy, I won't blot it out.

Depend upon it, we know better than to repeal our Masculine systems. Although they are in full force, we know they are little more than theory. We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice, you know We are the subjects. We have only the Name of Masters, and rather than give up this, which would completely subject Us to the Despotism of the Petticoat, I hope General Washington, and all our brave Heroes would fight. . . . A fine story indeed, I begin to think the ministry as deep as they are wicked. After stirring up Tories, landjobbers, trimmers, bigots, Canadians, Indians, Negroes, Hanoverians, Hessians, Russians, Irish Roman Catholics, Scotch, . . . at last they have stimulated the [women] to demand new privileges and [to] threaten to rebel.

Abigail Adams to John Adams
May 7, 1776

I cannot say that I think you very generous to the Ladies, for whilst you are proclaiming peace and good will to Men, Emancipating all Nations, you insist

upon retaining an absolute power over Wives. But you must remember that Arbitrary power is like most other things which are very hard, very liable to be broken—and notwithstanding all your wise Laws and Maxims we have it in our power not only to free ourselves but to subdue our Masters, and without violence throw both your natural and legal authority at our feet. . . .

Answer the following questions about the exchange of letters between Abigail Adams and John Adams. Use information in these documents to support or justify your answers.

1. How does Abigail Adams depict men in her letter of March 31, 1776?
2. Do you agree with her viewpoint? Why or why not?
3. On what principle does Abigail Adams base her demand that women "will not hold ourselves bound by any laws in which we have no voice or representation."
4. How does her statement compare with the attitudes of American "Patriots" toward the British government during the Revolutionary period?
5. Does John Adams' reply to his wife show a serious concern for her views?
6. Would you classify John Adams' reply as being one typical of a modern-day "male chauvinist"? Why or why not?
7. What does John Adams mean when he says "We have only the name of masters"? Interpret his meaning of fearing the "despotism of the petticoat."
8. What influence does John Adams think revolutionary activities have on various minority groups?
9. Examine the May 7, 1776 letter of Abigail Adams. What does she mean by "arbitrary power is like most other things which are very hard, very liable to be broken. . . ."?

John Adams' Letter to James Sullivan

In the following letter, John Adams reflected dominant views of his time about the legal rights of women. Examine the excerpts from this letter and respond to the questions that follow it.

John Adams to James Sullivan
May 26, 1776

It is certain, in theory, that the only moral foundation of government is, the consent of the people. . . .

But why exclude women?

You will say, because their delicacy renders them unfit for practice and experience in the great businesses of life, and the hardy enterprises of war, as well as the arduous cares of state. Besides, their attention is so much engaged with the necessary nurture of their children, that nature has made them fittest for domestic cares. And children have not judgment or will of their own. True. But will not these reasons apply to others? Is it not equally true, that men in general, in every society, who are wholly destitute of property, are also too little acquainted with public affairs to form a right judgment, and too dependent upon other men to have a will of their own? If this is a fact, if you give to every man who has no property, a vote, will you not make a fine encouraging provision for corruption, by your fundamental law? Such is the frailty of the human heart, that very few men who have no property, have any judgment of their own. They talk and vote as they are directed by some man of property, who has attached their minds to his interest. . . .

The same reasoning which will induce you to admit all men who have no property to vote with those who have, for those laws which affect the person, will prove that you ought to admit women and children; for, generally speaking, women and children have as good judgments, and as independent minds, as those men who are wholly destitute of property; these last being to all intents

> and purposes as much dependent upon others, who will please to feed, clothe, and employ them, as women are upon their husbands, or children on their parents. . . .
>
> Depend upon it, Sir, it is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions and prostrate all ranks to one common level.

Answer the following questions about John Adams' letter to Sullivan. Use information in this document to support or justify your answers.

1. What is John Adams' position on voting rights for women?
2. How does Adams try to justify and explain his position on voting rights for women? Identify at least two reasons used by Adams in support of his position.
3. What reasons could be advanced in opposition to Adams' position on voting rights for women? Present and explain at least two reasons that could be used to argue against Adams on this issue.

In the preceding letter, John Adams stated what most of his constituents believed. If dependent men were given the vote, the end result would be that landlords and employers would basically gain or exercise *multiple* votes. To give a vote to a person dependent on another's will would be giving a double vote in reality to the one in true power. Society assumed that a wife always did her husband's bidding. Would not giving the franchise to women be the same as giving married men a political advantage over their bachelor brothers? At this time in United States history, nearly all states denied the vote to married women, as well as to men without property. Single women fared no better. Only in New Jersey, where "all free inhabitants" (who met property and residence requirements) were granted the franchise, could women vote. Even New Jersey eventually reverted as a result of political lobbying, and in 1807 a new election law excluded all women from the polls.

By the time of the writing of the Constitution in 1787 there were no doubt several issues of particular concern to women in addition to suffrage, including divorce reform, pensions for the widows of Revolutionary soldiers, child custody, wife abuse, dower rights; but no organized female political pressure was in force, and not a single male delegate expressed such female concerns. The final document, ratified in 1788, reflected the dominant ideas of the men who wrote it and their constituents, which did not include concerns for the rights of women.

What *was* important, however, was what the Constitution left unsaid. In speaking of the new nation's citizens, "persons" is used ordinarily, seldom the generic term "he." Women were not specifically excluded from the 1787 Constitution. A number of choices on substantive matters, such as the right to vote, were clearly left to the states, and the Constitution would be left open to change by practice, amendment, or interpretation. Such flexibility, of course, is an important reason why the U.S. Constitution has endured, and it provided an opening for the eventual inclusion of women.

Reviewing and Interpreting Documents

Your teacher will divide the class into two groups. Group I has the task of interpreting and defending the position on women's rights in John Adams' letters to Abigail Adams and James Sullivan. Group II has the task of interpreting and rebutting the position on women's rights in John Adams' letters to Abigail Adams and James Sullivan. Three members of each group will be selected to briefly report the ideas of the group to the entire class.

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The Bill of Rights: A Bibliography

by KERMIT L. HALL

Scholars have devoted enormous energy to the origins and development of the first ten amendments to the Federal Constitution. They have done so in the hope of understanding the nature of power, authority, and liberty in American public life. As the writings below reveal, they disagree substantially about how much liberty Americans have enjoyed, but they share a consensus that these initial amendments to the Constitution have become not only an inventory of American's most important liberties but a source of the nation's civic religion.

One of the most heated areas of scholarly disagreement involves the process of incorporation. This term means that the various rights guaranteed in the Bill of Rights merged with—or were incorporated into—the Fourteenth Amendment's due process and equal protection clauses through Supreme Court decisions. The amendment, which was adopted in 1868, made all persons born or naturalized in the United States *citizens* of the United States as well as of the state in which they reside. Furthermore, it provided that *no state* should abridge the privileges and immunities of citizens or deny due process or equal protection of the laws to any person. The Fourteenth Amendment offered new opportunities for the application of the Bill of Rights against the states, but not until the mid-twentieth century was the full impact of the incorporation doctrine felt. As the works listed below indicate, the period of Earl Warren's service as chief justice (1953-1969) was particularly controversial, since under Warren's direction the Court broadly extended the major criminal justice provisions of the Bill of Rights against the states. In *Mapp* v. *Ohio* (1961), for example, the Court finally applied full Fourth Amendment protection involving illegal searches and seizures as extended to the states through the Fourteenth Amendment. Two years later, in *Gideon* v. *Wainwright*, the justices applied the full assistance-of-counsel clause of the Sixth Amendment to the states. While a few of the provisions of the Bill of Rights have not been incorporated (for example, the Second Amendment involving the right to bear arms), most have. When the states treat matters involving, for example, speech, press, and religion, they must follow certain national rather than local standards. The correctness of this doctrine, as the writings below indicate, has been hotly disputed, both as a matter of federalism and as an example of the Supreme Court's power.

Despite the outpouring of writing about the Bill of Rights, much work remains to be done. We have only a rough idea of the amendment's impact on women and other groups historically underrepresented in American politics. The Third and the Ninth Amendments have been badly neglected, even though the latter has assumed increasing importance in constitutional adjudication in the past quarter century. Finally, scholars are only beginning to give the history of property rights the level of attention that it deserves.

The list of writings that follows is meant to be suggestive. A fuller catalog of Bill of Rights scholarship, at least in history, can be found in Kermit L. Hall, *A Comprehensive Bibliography of American Constitutional and Legal History*, 7 vols. (Millwood, New York: Kraus International Publications, 1984 and 1991).

Willi Paul Adams, *The First American Constitutions* (Chapel Hill: University of North Carolina Press, 1980). Adams explains the important connection in late eighteenth-century America between individual liberty and state constitutions. The book is particularly useful when read in conjunction with Dumbauld and Rutland below.

Liva Baker, *Miranda: Crime, Law and Politics* (New York: Atheneum, 1983). Lengthy, detailed account of the most controversial Supreme Court decision on the rights of suspects. Written for a general audience.

Lois W. Banner, *Elizabeth Cady Stanton: A Radical for Women's Rights* (Boston: Little, Brown and Company, 1980). This volume is short, readable, and suited to secondary students. The author draws heavily on Stanton's own writings to achieve an "inside" narrative of the progress of woman suffrage.

Randy Barnett, ed. *The Rights Retained By the People: The History and Meaning of the Ninth Amendment* (Fairfax, Va.: George Mason University Press, 1989). The best available introduction to the history of the Ninth Amendment.

Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982). An important addition to the growing literature on married women's property acts.

Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977). A critical attack on the proposition that the framers of the Fourteenth Amendment meant to incorporate the Bill of Rights. Berger argues, as well, that the modern Supreme Court has played fast and loose with the Bill of Rights by failing to take proper account of what its framers intended.

Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: Oxford University Press, 1986). A spirited defense of the decision to protect "offensive" speech in the case of a neo-Nazi march through a town heavily populated by Jewish Holocaust survivors.

Richard C. Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of the Bill of Rights* (Madison: University of Wisconsin Press, 1981). The best analysis of the development of the incorporation doctrine and its implications for judicial power and liberty. A required book for anyone even remotely interested in the subject.

Archibald Cox, *The Warren Court* (Cambridge: Harvard University Press, 1968). A brief overview of the Warren Court's pathbreaking decisions. Places the major criminal procedure decisions in the context of the Court's decisions in the areas of civil rights and First Amendment rights. Useful for persons not trained in constitutional law.

Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986). Discusses the tensions between religion and authority during the colonial era and the first years of independence.

Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1966). An excellent analysis of the question of whether or not the framers of the Fourteenth Amendment meant to incorporate the Bill of Rights. Curtis believes that they did.

Jane DeHart-Mathews and Linda K. Kerber, eds.; *Women's America: Refocusing the Past* (Oxford: Oxford University Press, 1987). A successful introduction to women's history that contains both scholarly articles and short selections of primary sources, including snippets specifically devoted to women and the law.

Edward Dumbauld, *The Bill of Rights and What It Means Today* (Norman: University of Oklahoma Press, 1957). A valuable guide to the various state proposals, James Madison's plan for the Bill of Rights, and its connection to the English Bill of Rights.

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985). A critical analysis of departures from the original understanding of

On Today's Editorial Page
Ignoring The Jobless: Editorial
The Private School Cases: Editorial

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COURT UPHOLDS PRESS FREEDOM

Papers Free To Publish Pentagon Study

By RICHARD DUDMAN
Chief Washington Correspondent of the Post-Dispatch

WASHINGTON, June 30—The Supreme Court today swept away lower court restraints on newspaper publication of a secret Pentagon study of the Vietnam War.

By a 6-to-3 vote, the court lifted temporary restraining orders that had been imposed by United States district and appellate courts and gave the newspapers full authority to resume their accounts of the secret papers.

The decision applied directly to the New York Times and the Washington Post.

In St. Louis, U.S. District Judge James H. Meredith immediately lifted a temporary restraining order that he had granted last Saturday against the Post-Dispatch at the request of United States Attorney Thomas Barrett Jr.

The Post-Dispatch immediately resumed publication of a series of articles based on secret Pentagon documents that it has obtained. The first articles in the series were published last Friday.

The majority opinion held that the Government had failed to show that prior restraint — censorship in advance — was justified in the case of the Pentagon papers.

Voting for the newspapers and against the Government were Justices Hugo L. Black, William O. Douglas, William J. Brennan Jr., Potter Stewart, Byron R. White and Thurgood Marshall.

The three dissenters were Chief Justice Warren E. Burger and Associate Justices John M. Harlan and Harry A. Blackmun.

Chief Justice Burger announced the decision from the bench to a crowded courtroom. The court distributed a series of other rulings and then recessed until Oct. 4.

Each of the nine justices wrote his own opinion.

A brief joint majority opinion cited three earlier Supreme Court rulings. One, an obscenity case in 1963, said that any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity."

The second, a 1931 judgment declining to suppress an anonymous newspaper in Minneapolis, was along the same lines.

The third ruling, handed down earlier this year, permitted pamphleteers in Austin, Tex., to operate near the home and a church of a real estate dealer whom they had accused of racial blockbusting.

In that decision, written by Burger, the court said that the Government carries a heavy burden of showing justification for the enforcement of a restraint in free expression.

The majority noted that District Judges in New York and the District of Columbia, as well as the U.S. Circuit Court of Appeals here, had held in the two cases at hand that the Government had not met that burden.

We agree," the majority said simply.

The decision turned back an effort by the Government to maintain some degree of secrecy over the 47-volume Pentagon study. Large parts of which were being published by newspapers and read into records of the Senate.

Justice Black, the senior member of the Court, lashed at his colleagues for last week's 5-to-4 vote barring the newspapers from publishing some of the material while the Supreme Court was considering the case.

"In my view it is unfortunate that some of my brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Black said. Such a holding would make a shambles of the First Amendment.

Black said that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, inderensible, and continuing violation of the First Amendment.

The Government was enjoined in 1798 with the adoption of the Constitution, he said. The Bill of Rights, including the First Amendment, followed in 1791.

Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather

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the Fifth Amendment. This book calls for a rethinking of the constitutional doctrines that fueled the welfare state mentality of the 1980s.

Sara Evans, *Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left* (New York: Alfred A. Knopf, 1979). One of the few volumes that describes and explains the second feminist movement of the twentieth century, Evans' book locates the origins of the movement within both the civil rights and antiwar movements.

Daniel A. Farber and Suzanna Sherry, eds., *A History of the American Constitution* (St. Paul, MN: West Publishing Company, 1990). A collection of primary materials with commentary by the editors, the final section of which provides an excellent introduction to the complex issues of original understanding, judicial activism, and the Bill of Rights.

David Fellman, *The Defendant's Rights Today* (Madison, Wisc.: University of Wisconsin Press, 1975). A detailed, right-by-right survey of rights of the accused. A bit dated, but still quite useful as a guide to trial rights.

David H. Flaherty. *Privacy in Colonial America* (Charlottesville: University Press of Virginia, 1972). A study of early Americans' ambivalence about privacy rights.

David H. Flaherty. *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States* (Chapel Hill: University of North Carolina Press, 1989). A comparative study of the impact of information-gathering technology in the modern world.

Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement of the United States* (Cambridge, Mass.: Harvard University Press, 1975). Flexner's account is the standard work on the woman suffrage movement. Flexner furnishes a chronological and biographical account of the course of the movement.

John Hope Franklin and Alfred A. Moss, Jr., *From Slavery to Freedom*, 6th ed. (New York: A. A. Knopf, 1988). The basic introductory history of blacks in America and the place to begin reading about the Bill of Rights provisions as they have applied to African Americans.

Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Justice in Alameda County, California, 1870-1910* (Chapel Hill: University of North Carolina Press, 1981). A scholarly study of criminal justice in one community. In addition to statistics on the handling of cases, Friedman and Percival offer many anecdotes that recreate the feel of the criminal justice system.

Linda Gordon, *Woman's Body, Woman's Right: Birth Control in America* (New York: Penguin Books, 1976). A Marxist analysis of women's concerns with reproductive rights, Gordon provides an overview of the problems women encountered when they challenged prevailing legal and cultural restraints on birth control.

Fred Graham, *The Due Process Revolution: The Warren Court's Impact on Criminal Law* (New York: Hayden, 1970). This assessment of the Warren Court's expansion of rights of the accused, written by a CBS News reporter, is a solid, readable survey of the numerous decisions on defendants' rights during the 1960s.

Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (Albuquerque: University of New Mexico Press, 1985). The book contends that the Second Amendment endorses an individual right to arm.

Kermit Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989). An analysis of the interrelationship of public and private law, this book puts issues of civil liberties and civil rights, in the general context of social, economic, and political history.

Kermit Hall, ed., *By and For the People: Constitutional Rights in American History* (Arlington Heights, Illinois: Harlan-Davidson, 1991). A volume of essays on rights, designed for secondary school teachers.

Cynthia Harrison, *On Account of Sex: The Politics of Women's Issues, 1945-1968* (Berkeley: University of California Press, 1988). This book traces the development of the liberal branch of the women's movement in the period preceding the formation of the National Organization for Women in 1966 and thus serves as a companion to Sara Evans' work.

Nat Hentoff, *The First Freedom: The Tumultuous History of Free Speech in America* (New York: Delacorte, 1980). A popular history by a prominent civil libertarian who espouses the ideal that speech is the first and most important freedom.

Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (New York: Harper & Row, 1988). A landmark study of Supreme Court decisions, from 1920 to 1974, on First Amendment issues by a renowned legal scholar strongly supportive of civil liberties positions.

Yale Kamisar, *Police Interrogations and Confessions*

(Ann Arbor: University of Michigan Press, 1980). A collection of articles by one of the leading experts on the rights of criminal suspects.

Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill, NC: University of North Carolina Press, 1980). Examining several topics, Kerber gauges the effect of the Revolutionary War on women. Especially appropriate for any discussion on the ideological backdrop to the question of woman suffrage and divorce law, the book argues the development of "republican motherhood" was a woman's avenue into politics and citizenship.

Richard Kluger, *Simple Justice* (New York: Random House, 1975). A long but highly readable history of race relations in America. Focusing mostly on the *Brown* case, it also touches on all issues of race and constitutional law from the founding to the mid-1970s.

Leonard W. Levy, *Constitutional Opinions: Aspects of the Bill of Rights* (New York: Oxford University Press, 1986). A series of brilliant essays that boldly support the idea that judges have a responsibility to protect individual liberty through an expansive reading of the Bill of Rights.

Leonard W. Levy, *The Emergence of a Free Press* (New York: Oxford University Press, 1985). The classic historical account of ideas and practices during the colonial period and the early years of the republic.

Leonard W. Levy, *The Establishment Clause and the First Amendment* (New York: Macmillan, 1986). The best single overview of problems arising under the Establishment Clause.

Leonard W. Levy, *Original Intent and The Framers' Constitution* (New York: Macmillan, 1988). A collection of articles on constitutional law that contains the best criticism of the "original intent" argument. Extremely useful for the nonspecialist.

Leonard W. Levy, *Origins of the Fifth Amendment* (New York: Oxford University Press, 1968). Levy dissects the history of one of the most important parts of the Bill of Rights, revealing in the process the interaction of law and politics.

Anthony Lewis, *Gideon's Trumpet* (New York: Vintage Books, 1966). It is the best account of a major Supreme Court decision on the extension of the right to counsel. A brief, readable classic.

Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988). A brilliant discussion of the role of the Magna Carta and the common law in development of early American constitutionalism and the Bill of Rights.

Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1988). A series of essays highly critical of First Amendment decisions that protect pornography.

Herbert McClosky and Alida Brill, *Dimensions of Tolerance: What Americans Believe About Civil Liberties* (New York: Russell Sage Foundation, 1983). A fine analysis of contemporary attitudes toward civil liberties, which concludes that it is easier to teach intolerance than tolerance.

David Manwaring, *Render Unto Caesar: The Flag Salute Controversy* (Chicago: University of Chicago Press, 1962). Places the flag salute cases in the broader context of a nation at war as well as in the context of the emerging jurisprudence of the First Amendment.

William Lee Miller, *The First Liberty: Religion and the American Republic* (New York: Knopf, 1986). An especially well balanced analysis of the complex relations between religion and authority in early America.

Richard E. Morgan, *Disabling America: The "Rights Industry" in Our Time* (New York: Basic Books, 1984). A conservative critique of the growth of judicially protected rights.

Paul L. Murphy, *The Constitution in Crisis Times, 1918–1969* (New York: Harper & Row, 1972). A fine synthesis of Bill-of-Rights developments during the twentieth century.

Paul L. Murphy, *The Meaning of Free Speech: First Amendment Freedoms from Wilson to Roosevelt* (Westport, Conn.: Greenwood, 1972). An account of various free-speech battles of the 1920s and 1930s.

Paul L. Murphy, *World War I and the Origins of Civil Liberties in the United States* (New York: W. W. Norton & Co., Inc. 1979). A thoughtful and important analysis, by a leading constitutional historian, of the rise of a national surveillance state and the countervailing emergence of new ideas about free speech.

John J. Patrick, *Ideas of the Founders on Constitutional Government: Resources for Teachers of History and Government* (Bloomington: ERIC Clearinghouse for Social Studies/Social Science Education, 1991).

John J. Patrick and Robert S. Leming, eds., *Resources for Teachers on the Bill of Rights* (Bloomington: ERIC Clearinghouse for Social Studies/Social Sci-

ence Education, 1991). A collection of essays, documents, lessons, and bibliographies for high school teachers.

J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975). This lengthy study examines the development of classical republican thought from Machiavelli through the American Revolution.

John Philip Reid. *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988). A controversial study of early understandings of liberty within the British empire.

John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (Madison, Wisc.: University of Wisconsin Press, 1986). A thoroughly documented analysis of the intellectual and cultural basis for constitutional rights, this book is critical to an understanding of eighteenth-century constitutionalism.

Norman L. Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill: University of North Carolina Press, 1990). An overview of libel law which includes broader material on the socioeconomic and cultural background of free-speech battles from colonial times to the present.

Robert A. Rutland, *The Birth of the Bill of Rights, 1776–1791*, Classic Edition (Boston: Northeastern University Press, 1983). A skillful analysis of the political and personal struggles behind the creation of the Bill of Rights.

Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986). An analysis of contracts, property transactions, divorces, estates, and provisions for widows, this book demonstrates the diversity of colonial law and how some legislatures and courts worked to liberate women from some of the constraints of the English common law.

Michael Schudson, *Discovering the News: A Social History of American Newspapers* (New York: Basic Books, Inc., 1978). An overview of nineteenth-century models of journalism by a leading media scholar, which explores First Amendment issues.

Bernard Schwartz, *The Bill of Rights: A Documentary History*, 2 vols. (New York: Chelsea House, 1971). Schwartz not only provides the major documentary evidence surrounding the creation of the Bill of Rights but offers useful commentary as well.

Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (New York: Oxford University Press, 1977). A splendid explanation of the framing of the first ten amendments accompanied by an analysis of post-1791 developments.

John H. F. Shattuck, ed. *Rights of Privacy* (Skokie, Ill: National Textbook Company, 1977). A handbook, written for lay readers, that provides a readable, detailed summary of privacy law.

James Morton Smith, *Freedom's Fetters: Alien and Sedition Laws and American Civil Liberties* (Ithaca, NY: Cornell University Press, 1956). The fullest and best historical discussion of the free-press debates of 1798 to 1800.

Rodney K. Smith, *Public Prayer and the Constitution* (Wilmington: Scholarly Resources, 1987). An overview of the cases and issues involved in the public prayer debate, as well as the conflicting constitutional positions.

Rodney A. Smolla, *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (New York: St. Martin's Press, Inc., 1988). A popularly oriented analysis of an important free-speech battle.

Rodney A. Smolla, *Suing the Press: Libel, the Media and Power* (New York: Oxford University Press, 1986). An authoritative analysis of recent libel cases.

Wayne R. Swanson, *The Christ Child Goes to Court* (Philadelphia: Temple University Press, 1989). Case study of *Lynch v. Donnelly* that provides insight generally into the issue of church-state relations.

Melvin I. Urofsky, *A March of Liberty: A Constitutional History of the United States* (New York: Alfred A. Knopf, 1988). A thorough survey of American constitutional history with special emphasis given to the impact of the Bill of Rights.

Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 1980). A short history of American criminal justice that gives a fine account of the development of constitutional rights during the Warren Court era.

Alan F. Westin. *Privacy and Freedom* (New York: Atheneum Press, 1967). A discussion of relations between privacy and liberty since American independence.

Kermit Hall is Associate Provost and professor of history and law at the University of Florida.

Bicentennial Gazette

The following organizations are conducting programs or distributing materials for the Bicentennial of the Bill of Rights.

Bill of Rights Resource Organizations

Agency for Instructional Technology, Box A, Bloomington, IN 47402 (812/339-2203).

American Association of Retired Persons, 1909 K Street, NW, Washington, DC 20049 (202/872-4700).

American Bar Association, Special Committee on Youth Education for Citizenship, 541 North Fairbanks Court, Chicago, IL 60611 (312/988-5738).

American Civil Liberties Union, 132 West 43rd Street, New York, NY 10036 (212/944-9800).

American Enterprise Institute, 1150 17th Street, NW, Washington, DC 20036 (202/862-5800).

American Historical Association, 400 A Street, SE, Washington, DC 20003 (202/544-2422).

American Indian Heritage Foundation, 6051 Arlington Boulevard, Falls Church, VA 22044 (703/237-7500).

American Legion, National Headquarters, 700 N. Pennsylvania Street, Indianapolis, IN 46204 (317/635-8411).

American Library Association, 50 East Huron Street, Chicago, IL 60611 (312/944-6780).

American Political Science Association, 1527 New Hampshire Avenue, NW, Washington, DC 20036 (202/483-2512).

American Studies Center, 499 S. Capitol Street, SW, Suite 417, Washington, DC 20003 (202/488-7122).

AMVETS, National Service Foundation, 4647 Forbes Boulevard, Lanham, MD 20706 (301/459-6181).

Association for the Study of Afro-American Life and History, 1401 14th Street, NW, Washington, DC 20005 (202 667-2822).

Boy Scouts of America, 1325 Walnut Hill Lane, P.O. Box 152079, Irving, TX 75015-2079 (214/580-2000).

Camp Fire, Inc., 4601 Madison Avenue, Kansas City, MO 64112 (816/756-1950).

Center for Civic Education, 5146 Douglas Fir Road, Calabasas, CA 91302 (818/340-9320).

Center for Constitutional Rights, 666 Broadway, New York, NY 10012 (212/614-6464).

Center for Research and Development in Law-Related Education (CRADLE), Wake Forest University School of Law, P.O. Box 7206, Reynolda Station, Winston-Salem, NC 27109 (919/759-6061).

Center for the Humanities, Communications Park, P.O. Box 1000, Mt. Kisco, NY 10549 (914/666-4100).

Center for the Study of Ethnic Publications and Cultural Institutions, Kent State University, University Library, Room 314, Kent, OH 44242 (216/672-2782).

Chicago Historical Society, 1601 N. Clark Street, Chicago, IL 60614 (312/642-4600).

Claremont Institute for the Study of Statesmanship and Political Philosophy, 4650 Arrow Highway, Suite D-6, Montclair, CA 91763-1216 (714/621-6825).

CloseUp Foundation, 44 Canal Center Plaza, Alexandria, VA 22314 (1-800/356-5136).

Commission on the Bicentennial of the U.S. Constitution, 808 17th Street, NW, 8th Floor, Washington, DC 20006 (202/653-9800).

Committee on the Constitutional System, 1755 Massachusetts Avenue, NW, Suite 416, Washington, DC 20036 (202/387-8787).

Congressional Quarterly Inc., 1414 22nd Street, NW, Washington, DC 20037 (202/887-8500).

Constitutional Rights Foundation-Chicago, 407 S. Dearborn, Suite 1700, Chicago, IL 60605 (312/663-9057).

Constitutional Rights Foundation-Los Angeles, 601 South Kingsley Drive, Los Angeles, CA 90005 (213/487-5590).

Convention II, P.O. Box 1987, Washington, DC 20013 (202/544-1789).

Council for the Advancement of Citizenship, 1200 18th Street, N.W., Suite 302, Washington, DC 20036 (202/857-0580).

Council of Chief State School Officers, 379 Hall of the States, 400 North Capitol Street, NW, Washington, DC 20001-1511 (202/393-8161).

Daughters of the American Revolution, 1776 D Street, N.W., Washington, DC 20006. (202/628-1776).

Delaware Heritage Commission, 820 N. French Street, 4th floor, Wilmington, DE 19801 (302/577-2144).

Eastern National Parks & Monuments Assn., 446 North Lane, Conshohocken, PA 19428 (1-800/634-9690).

Educational Excellence Network, 1112 16th Street, NW, Suite 500, Washington, DC 20036 (202/785-2985).

ERIC/ChESS, 2805 E. 10th Street, Bloomington, IN 47408 (812/855-3838).

First Federal Congress Project, George Washington University, Washington, DC 20052 (202/676-6777).

Foreign Policy Association, 729 7th Avenue, New York, NY 10019 (212/764-4050).

General Federation of Women's Clubs, 1734 N Street, NW, Washington, DC 20036-2990 (202/347-3168).

Girl Scouts of the U.S.A., 830 Third Avenue, New York, NY 10022 (212/940-7500).

Guidance Associates Inc., Communications Park, Box 1000, Mount Kisco, NY 10549 (914/666-4100).

Hispanic Association of Colleges and Universities, 4204 Gardendale, Suite 216, San Antonio, TX 78229 (512/433-5101).

Historical Society of Pennsylvania, 1300 Locust Street, Philadelphia, PA 19107 (215/732-6200).

Institute of Bill of Rights Law, Marshall-Wythe School of Law, The College of William & Mary, Williamsburg, VA 23185 (804/221-3810).

Japanese American Citizens League, 1730 Rhode Island Avenue, NW, Suite 204, Washington, DC 20036 (202/223-1240).

Jefferson Foundation, 1529 18th Street, N.W., Washington, DC 20036 (202/234-3688).

League of United Latin American Citizens (LULAC), 900 East Karen, Suite #C-215, Las Vegas, NV 89109 (702/737-1240).

League of Women Voters of the United States, 1730 M Street, NW, Washington, DC 20036 (202/429-1965).

Library of Congress, Washington, DC 20540 (202/707-5000).

National Archives and Records Administration, 7th and Pennsylvania Avenue, NW, Washington, DC 20408 (202/501-5402).

National Association for Equal Opportunity in Higher Education, 400 12th Street, NE, Room 207, Washington, DC 20002 (202/543-9111).

National Association for the Advancement of Colored People (NAACP), 4805 Mount Hope Drive, Baltimore, MD 21215 (301/486-9139).

National Center for Constitutional Studies, 5288 S 320th W, Suite B-158, Salt Lake City, Utah 84107 (801/261-1776).

National Center for Urban & Ethnic Affairs, Box 20, Cardinal Station, Washington, DC 20064 (202/232-3600).

National Conference of Christians and Jews, 71 Fifth Avenue, Suite 1100, New York, NY 10003 (212/206-0006).

National Constitution Center, 325 Chestnut Street, Philadelphia, PA 19106 (215/923-0004).

National Council for the Social Studies (NCSS), 3501 Newark Street, NW, Washington, DC 20016 (202/966-7840).

National Federation of State Humanities Councils, 1012 14th Street, N.W., Washington, DC 20005 (202/393-5400).

National Geographic Society, Educational Services, 1145 17th Street, NW, Washington, DC 20036 (202/857-7000).

National Hispanic Quincentennial Commission, 810 First Street, NE, 3rd Floor, Washington, DC 20002 (202/289-1380).

National History Day, 11201 Euclid Avenue, Cleveland, OH 44106 (216/368-4155).

National Issues Forum, 100 Commons Road, Dayton, OH 45459-2777 1(800/433-7834).

National Urban League, 500 E. 62nd Street, New York, NY 10021 (212/310-9000).

New-York Historical Society, 170 Central Park West, New York, NY 10024 (212/873-3400).

New York Public Library, Fifth Avenue and 42nd Street, New York, NY 10018-2788 (212/221-7676).

Organization of Chinese Americans, 2025 Eye Street, NW, Suite 926, Washington, DC 20006 (202/223-5500).

Pennsylvania Humanities Council, 320 Walnut Street, Suite 305, Philadelphia, PA 19106 (215/925-1005).

Public Broadcasting Service, 1320 Braddock Place, Alexandria, VA 22314 (703/739-5000).

Pyramid Film and Video, P.O. Box 1048, Santa Monica, CA 90406 (213/828-7577).

Schomburg Center for Research in Black Culture, 515 Malcolm X Blvd., New York, NY 10037 (212/862-4141).

Smithsonian Office of Elementary and Secondary Education, Room 1163, Arts and Industries Building, Smithsonian Institution, Washington, DC 20560 (202/357-2425).

Social Science Education Consortium, 3300 Mitchell Lane, Suite 240, Boulder, CO 80301-2272 (303/492-8154).

U.S. Capitol Historical Society, 200 Maryland Avenue, NE, Washington, DC 20002 (202/543-8919).

U.S. Department of the Army, Office of the Chief of Public Affairs, Command Information Division (SAPA-CI-PMB), Pentagon, Washington, DC 20310 (703/695-3101).

Veterans of Foreign Wars, VFW Building, 406 West 34th Street, Kansas City, MO 64111 (816/756-3390).

World Monitor Television, One Norway Street, Boston, Massachusetts 02115 (617/450-2000).

Martin Luther King, Jr., and Roy Wilkins lead "march of mourning," Jackson, Mississippi, June 15, 1963, after the murder of Medgar Evers. UPI/Bettman.

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civil liberties; recognizes existence of slavery in states and provides for return of fugitive slaves; ratified 1788.

1791

Bill of Rights (Amendments I through X) ratified: Guarantees civil liberties of individuals by placing limits on federal government in matters concerning speech and press freedom, free exercise of religion, rights of assembly and petition; secures right to bear arms; prohibits unreasonable searches and seizures; safeguards individuals against excesses of the justice system through variety of provisions, including guarantee against being twice tried for the same offense and self-incrimination; protects life, liberty, and property against deprivation without due process of law and prohibits taking of private property for a public purpose without just compensation; reserves to states or the people powers not delegated to the United States.

1793

Fugitive Slave Act: Federal statute authorizes claimant to arrest fugitive slave in any state, and upon proof of service owed to remove fugitive to state from which he fled.

1798

Sedition Act: Federal statute declares it a crime to write or publish false, scandalous, and malicious statements against government of U.S.

1798-99

Kentucky and Virginia Resolutions: Protests written by Thomas Jefferson and James Madison charging that Sedition Act violates First Amendment and invades sphere of state power to regulate speech and press freedom.

1807

U.S. v. Burr: Chief Justice John Marshall, on circuit, renders a narrow interpretation of the treason clause of the Constitution, negating it as a partisan political weapon in American history.

1808

Embargo Act: Enacted on the demand of President Jefferson, it forbids all U.S. vessels to leave for foreign ports; restricts commercial rights of American citizens.

Act of Congress ends legal importation of foreign slaves.

1812

U.S. v. Hudson and Goodwin: Supreme Court decides there is no criminal common law under U.S. authority, thus denying federal power to enforce common law crimes against the people.

1820

Missouri Compromise: Congress prohibits slavery in Louisiana Purchase north of 36°30′ line; admits Missouri as slave state, Maine as free state.

1823

Corfield v. Coryell: Federal circuit court opinion by Supreme Court Justice Bushrod Washington interprets privileges and immunities clause (Art. IV, sect. 2) as requiring each state to grant persons from other states the same rights accorded its own citizens, including protection of life, liberty, and property; access to courts and privilege of writ of habeas corpus; freedom from discriminatory taxation; the right to vote.

1833

Barron v. Baltimore: Supreme Court rejects claim that city street improvements that caused ruin of a privately owned commercial dock is a taking of property that requires just compensation under Fifth Amendment; holds Fifth Amendment and, by extension, all of Bill of Rights limits federal government, not state governments.

1836

Gag Resolution: House of Representatives resolution provides that all petitions on slavery or abolition of slavery be laid on the table without being printed or referred; restricts right to petition conferred by First Amendment.

1842

Prigg v. Pennsylvania: Supreme Court strikes down state law banning forcible seizure and removal of a fugitive as inconsistent with fugitive slave clause of Constitution; holds federal government has exclusive power to enforce constitutional provision on fugitive slaves.

1848

Seneca Falls, N.Y. women's rights convention adopts ***Declaration of Sentiments***, modeled on the Declaration of Independence, that contains a demand for woman suffrage.

1850

Fugitive Slave Act: Authorizes federal commissioners to decide disputes over alleged fugitive slaves on the basis of one-sided evidence; denies persons claiming to be free the right of trial by jury and refuses to admit their testimony as evidence in proceedings under the law.

Act abolishing the slave trade in the District of Columbia.

1854

Kansas-Nebraska Act: Repeals Missouri Compromise prohibition of slavery in Louisiana Purchase; permits status of slavery to be determined by territorial voters and legislature.

1857

Dred Scott v. Sandford: Supreme Court declares blacks not U.S. citizens under the Constitution; holds Missouri Compromise prohibition of slavery inconsistent with Fifth Amendment protection of property against deprivation without due process of law.

1861

President Lincoln suspends writ of habeas corpus as part of internal security policy for dealing with rebellion of seceded states (Confederate States of America).

1862

Confiscation Act: Congress declares it a crime to engage in or aid the rebellion; provides for emancipation of slaves of persons engaged in rebellion; provides for seizure of property of persons supporting the rebellion.

1863

Habeas Corpus Act: Congress confirms federal executive power to suspend writ of habeas corpus and further regulates U.S. internal security policy.

Emancipation Proclamation: President Lincoln declares slaves in states still in rebellion to be free; commits executive branch to recognizing and maintaining freedom of emancipated slaves, declares they will be received into armed service of U.S.

1865

Thirteenth Amendment ratified: Declares neither slavery nor involuntary servitude shall exist in the U.S. and places subject to its jurisdiction; gives Congress power to enforce prohibition by appropriate legislation.

1866

Civil Rights Act: Declares that all persons born in U.S. (excluding Indians) are citizens of U.S.; citizens have the right, irrespective of race, color and previous condition of slavery, to make and enforce contracts, purchase, hold, and convey real and personal property, sue and give evidence, and enjoy the full and equal benefit of all laws and proceedings for the protection of person and property.

1867

Military Reconstruction Act: Congress establishes military governments in ten former Confederate states to protect persons in their rights of person and property; confers right to vote on black citizens in states covered by the act.

1868

Fourteenth Amendment ratified: Declares that all persons born or naturalized in U.S. are citizens of U.S. and of the state in which they reside; prohibits states from abridging privileges and immunities of U.S. citizens, depriving any person of life, liberty, and property without due process of law, and denying any person the equal protection of the laws; reduces basis of representation in Congress when the right to vote is denied to any male inhabitants of a state.

1870

Fifteenth Amendment ratified: Prohibits U.S. or any state from denying the right of U.S. citizens to vote on account of race, color, or previous condition of servitude.

Enforcement Act: Congress prohibits state officials from discriminating among voters on the basis of color in local elections; makes bribery and intimidation of voters by individuals a federal crime; outlaws conspiracies to prevent citizens from exercising federal constitutional rights.

1871

Enforcement Act (Feb.): Congress provides for appointment of federal officials to supervise voter registration and oversee congressional elections in cities of over 20,000 population.

Enforcement Act (April): Congress enforces Fourteenth Amendment by prohibiting individuals from denying equal protection of the laws and infringing privileges and immunities of U.S. citizens; prohibits acts of individuals that prevent state officers from protecting citizens equally; authorizes President to suspend writ of habeas corpus and employ military force to suppress conspiracies against civil rights when a state is unable to do so; known also as Ku Klux Klan Act.

1873

Slaughter House Cases: Supreme Court denies economic liberty claim under Fourteenth Amendment, upholds state regulation of business; gives narrow interpretation to privileges and immunities clause of Fourteenth Amendment and national citizenship, in contrast to broad civil rights content of state citizenship.

Bradwell v. Illinois: Supreme Court rejects claim of female attorney that state law denying women right to practice law violates Fourteenth Amendment privileges and immunities clause.

1875

Civil Rights Act: Declares all persons entitled to the full and equal enjoyment of public accommodations in inns, transportation facilities, places of public amusement; punishes individuals who deny others equal access to these facilities.

Minor v. Happersett: Supreme Court holds right to vote is not a privilege or immunity of U.S. citizenship under Fourteenth Amendment; states may restrict suffrage to males.

1879

Reynolds v. U.S.: Supreme Court holds that Mormon polygamy is not a protected form of religious freedom under the First Amendment free exercise clause.

1880

Strauder v. West Virginia: Supreme Court holds state law excluding black citizens from jury service a violation of equal protection clause of Fourteenth Amendment.

1883

U.S. v. Harris: Supreme Court invalidates indictment under Ku Klux Klan Act because act is directed against

private discrimination and thus exceeds state action limitation of Fourteenth Amendment.

Civil Rights Cases: Supreme Court declares Civil Rights Act of 1875 unconstitutional because directed at private discrimination rather than state action.

1884

Hurtado v. California: Supreme Court holds due process clause of Fourteenth Amendment does not require states to indict by grand jury in criminal cases; Fifth Amendment and by implication the Bill of Rights are not incorporated in due process clause of Fourteenth Amendment as a limitation on states.

1886

Yick Wo v. Hopkins: Supreme Court strikes down racially neutral municipal ordinance regulating conduct of laundry business as a violation of Fourteenth Amendment equal protection clause because the ordinance is enforced so as to discriminate against Chinese.

1890

Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota: Supreme Court holds railroad rates set by state must be reasonable to comply with due process clause of Fourteenth Amendment; first in line of substantive due process decisions upholding economic liberty against state police power regulation.

1895

In re Debs: Supreme Court sustains broad injunction restraining striking railway workers from interfering with interstate commerce and delivery of the mails.

1896

Plessy v. Ferguson: Supreme Court declares state law mandating racial segregation in transportation is consistent with equal protection clause of Fourteenth Amendment; source of separate but equal rule subsequently applied to schools and other aspects of public life in southern states.

1897

Chicago, Burlington and Quincy Railroad Co. v. Chicago: Supreme Court decides due process clause of Fourteenth Amendment requires state to give just compensation for private property taken for a public purpose; starts process of judicial incorporation of Bill of Rights in Fourteenth Amendment.

1905

Lochner v. New York: Supreme Court strikes down state law limiting hours of employment in bakeries as denial of liberty of contract guaranteed by due process clause of Fourteenth Amendment.

1907

Patterson v. Colorado: Supreme Court rejects claim that conviction of a newspaper editor who vigorously criticized the state supreme court violates a guarantee of freedom of the press applicable against the states under the Fourteenth Amendment.

1908

Loewe v. Lawlor: Supreme Court declares that labor union coercion of third parties to sever business relations with an employer (i.e. a secondary boycott) violates commerce clause of the Constitution.

Adair v. U.S.: Supreme Court decides that act of Congress prohibiting interstate carrier from dismissing employee because of membership in a labor union denies liberty of contract under the Fifth Amendment.

Muller v. Oregon: Supreme Court declares state law limiting hours of employment of women to 10 hours a day is a valid exercise of the police power; permits protective legislation regulating employment of women, but not men.

1913

Seventeenth Amendment ratified: provides for direct election of U.S. Senators by citizens in the states.

1914

Weeks v. U.S.: Supreme Court adopts the exclusionary rule blocking the use of illegally seized material by the federal government in legal proceedings.

1915

Guinn v. U.S.: Supreme Court invalidates state "grandfather" laws regulating the suffrage as a violation of black citizens' rights under the Fifteenth Amendment.

1917

Buchanan v. Warley: Supreme Court declares local ordinance requiring residential racial segregation to be a denial of property rights under the Fourteenth Amendment.

Espionage Act: Makes it a felony to cause insubordination in the armed forces, to obstruct enlistment and recruiting services of U.S., to convey false statements with intent to interfere with military operations; authorizes ban of treasonable or seditious materials from the mails.

1918

Sedition Act: Declares it a felony to utter, print, or publish disloyal, profane, scurrilous, or abusive language about the U.S. Constitution, government, armed forces, or to oppose by word or action the cause of the U.S. in the war against Germany.

1919

Schenck v. U.S.: Supreme Court sustains convictions under Espionage Act as consistent with the requirements of the First Amendment; decision is based on clear and present danger test for evaluating free speech conflicts announced for first time by Justice Oliver Wendell Holmes, Jr.

Abrams v. U.S.: Supreme Court upholds convictions under Sedition Act under the traditional "bad tendency" test for deciding First Amendment claims.

1920

Nineteenth Amendment ratified: Declares right of U.S. citizens to vote shall not be denied on account of sex.

1922

Cable Act: Permits American women married to foreign nationals to retain their American citizenship.

1923

Meyer v. Nebraska: Supreme Court strikes down state law prohibiting the teaching of modern foreign languages other than English as a violation of liberty under the Fourteenth Amendment.

Adkins v. Children's Hospital: Supreme Court invalidates a District of Columbia minimum wage law for the protection of women as a violation of employers' rights under the Fourteenth Amendment.

1925

Pierce v. Society of Sisters: Supreme Court declares state law requiring children to attend public schools is a destruction of property rights in private schools and violates parents' rights under Fourteenth Amendment due process clause.

Gitlow v. New York: Supreme Court upholds state criminal anarchy statute as a reasonable police power regulation not in conflict with First Amendment; assumes that First Amendment speech and press freedoms are guaranteed against infringement by the states under the due process clause of Fourteenth Amendment.

1928

Olmstead v. U.S.: Supreme Court approves use of evidence obtained from wiretaps as consistent with requirements of Fourth Amendment; rejects claim that Fifth Amendment right against self-incrimination is violated by use of wiretap evidence.

1931

Stromberg v. California: Supreme Court declares state law against displaying a red flag as symbol of anarchism and opposition to government violates First Amendment free speech guarantees included in due process clause of Fourteenth Amendment.

Near v. Minnesota: Supreme Court decides that a state law permitting suppression or prior restraint of any malicious, scandalous, or defamatory newspaper is a violation of First Amendment freedom of the press as incorporated in the Fourteenth Amendment.

1932

Powell v. Alabama: Supreme Court holds due process clause of Fourteenth Amendment requires appointment of an attorney for a person accused of a capital crime in order to guarantee a fair trial.

1935

National Labor Relations Act: Guarantees right of labor to organize for purpose of collective bargaining; prohibits discrimination against employees because of labor union membership.

1936

Brown v. Mississippi: Supreme Court holds that Fourteenth Amendment due process clause prohibits use of forced confessions in state criminal trials.

1937

DeJonge v. Oregon: Supreme Court strikes down conviction under state criminal syndicalist law as a violation of rights of freedom of speech and assembly protected by due process clause of Fourteenth Amendment.

Herndon v. Lowry: Supreme Court invalidates conviction under state anti-insurrection law because state did not prove actions of accused created a clear and present danger to public safety.

Palko v. Connecticut: Supreme Court rejects claim that Fifth Amendment right not to be tried twice for the same offense is included in due process clause of Fourteenth Amendment; announces principle of selective incorporation in due process clause of those rights in the Bill of Rights that are "implicit in the concept of ordered liberty."

West Coast Hotel v. Parrish: Supreme Court upholds state minimum wage law as constitutional exercise of police power; rejects substantive due process economic liberty claim under Fourteenth Amendment.

1938

Lovell v. Griffin: Supreme Court invalidates city ordinance prohibiting distribution of literature without permission of city government as a violation of the First Amendment.

U.S. v. Carolene Products Co.: Supreme Court upholds federal ban on interstate shipment of "filled" milk (milk in which natural fat has been replaced with coconut oil); Court plurality asserts doctrine of judicial deference to economic regulation and strict scrutiny (reversing the presumption of constitutionality) toward legislation that appears to be within a specific prohibition of the Constitution, that restricts the political processes and is directed at religious, national, or racial minorities; declares prejudice against discrete and insular minorities may be a special condition that calls for more searching judicial inquiry.

Missouri ex rel. Gaines v. Canada: Supreme Court decides that refusal of state to admit black applicant to its law school violates equal protection clause of the Fourteenth Amendment.

1939

Hatch Act: Congress prohibits federal employees from engaging in partisan political activity.

1940

Alien Registration Act: Congress declares it unlawful to advocate overthrowing the U.S. government by force and violence, to publish material advising or teaching

such a result, and to join in knowing membership in any group advocating the overthrow of the government.

Thornhill v. Alabama: Supreme Court invalidates state law prohibiting peaceful picketing, which is considered a form of speech protected by the First Amendment.

Minersville School District v. Gobitis: Supreme Court upholds school board policy requiring children in public schools to salute the flag; rejects claim that policy violates right to free exercise of religion.

Cantwell v. Connecticut: Supreme Court incorporates the First Amendment free exercise clause into the Fourteenth Amendment in throwing out a local ordinance requiring solicitors of funds to have their cause validated by city officials.

1941

President Roosevelt issues ***Executive Order 8802*** creating Fair Employment Practices Committee and prohibiting racial and religious discrimination in federal employment and in defense industry employment.

Edwards v. California: Supreme Court declares state law prohibiting the transporting of indigent persons into state is a violation of the commerce clause.

1942

Internment of Japanese-American citizens: President Roosevelt Executive Order 9066 orders transfer of American citizens of Japanese ancestry and permanent resident aliens in west coast states to detention camps as a military security measure.

Chaplinsky v. New Hampshire: Supreme Court sustains conviction under a state law punishing offensive speech; declares obscene and insulting speech ("fighting words") lie outside the protection of First Amendment.

1943

West Virginia State Board of Education v. Barnette: Supreme Court reverses *Gobitis* decision, declares state law requiring flag salute an unconstitutional denial of religious liberty protected by the Fourteenth Amendment.

Hirabayashi v. U.S.: Supreme Court upholds military curfew for American citizens of Japanese descent as an exercise of the war power; declares racial distinctions between citizens are "odious" and in effect constitute a suspect legislative classification warranting strict judicial scrutiny.

1944

Korematsu v. U.S.: Supreme Court approves Japanese-American relocation order as valid exercise of executive and legislative war powers.

Smith v. Allwright: Supreme Court reverses previous decision permitting political parties to organize as private clubs for the purpose of excluding black citizens; political party convention actions are state action under the Fifteenth Amendment.

1945

New York State Law Against Discrimination: Declares opportunity to obtain employment without discrimination because of race, creed, color, or national origin is a civil right; creates fair employment practices commission to enforce the right.

1947

Federal Loyalty Program: President Truman establishes loyalty program based on the standard that a person can be refused employment or removed from employment in federal service if reasonable grounds exist for believing the person is disloyal to the U.S. government; identifies membership in totalitarian or subversive organizations, among other things, as basis for determination of disloyalty.

Everson v. Board of Education: Supreme Court approves state funding of transportation to parochial schools as a means of upholding First Amendment free exercise of religion; asserts that establishment clause in First Amendment was intended to erect a wall of separation between church and state.

1948

Goesaert v. Cleary: Supreme Court rejects claim of a woman that a state law denying her the right to obtain a bartender's license violates the equal protection clause of the Fourteenth Amendment.

President Truman orders equal treatment irrespective of race in the armed forces; creates federal fair employment board in the Civil Service Commission.

Shelley v. Kraemer: Supreme Court holds state court enforcement of a racially restrictive real estate covenant is state action in violation of the Fourteenth Amendment.

1950

Internal Security Act: Congress requires Communist party to register with the government and disclose its officers, membership, sources of financial support, and activities; provides for registration of Communist-action and Communist-front organizations.

1951

Dennis v. U.S. Supreme Court upholds convictions of Communist party members under Alien Registration (Smith) Act as consistent with First Amendment, according to the clear and present danger test.

1954

Brown v. Board of Education: Supreme Court declares doctrine of separate but equal has no place in the field of public education; racial segregation in public schools violates the equal protection clause of the Fourteenth Amendment.

1955

Brown v. Board of Education (II): Supreme Court remands cases to federal district courts for implementa-

tion of the desegregation order "with all deliberate speed" under courts' equitable powers.

1957

Yates v. U.S.: Supreme Court overturns convictions of Communist party members under Alien Registration (Smith) Act; distinguishes between advocacy of doctrine and advocacy of action, thereby making prosecution under the statute practically impossible.

Watkins v. U.S.: Supreme Court reverses a contempt of Congress conviction of a labor leader who claimed a First Amendment right not to answer questions about the membership of other persons in the Communist party; decision restricts congressional power of investigation.

Civil Rights Act: Congress makes it a federal crime to interfere with exercise of the right to vote; authorizes the Attorney General to seek injunctions to prevent interference with the suffrage; creates U.S. Commission on Civil Rights.

1958

Cooper v. Aaron: Supreme Court orders state officials in Arkansas to comply with school desegregation decision in *Brown*.

1959

Barenblatt v. U.S.: Supreme Court affirms conviction for contempt of Congress for refusing to answer questions about Communist infiltration of education; upholds congressional power of investigation into Communist party membership as a valid legislative purpose consistent with the First Amendment.

1960

Civil Rights Act: Congress provides for appointment of federal voter-referees to investigate interference with the right to vote.

1961

President Kennedy issues Executive Order 10925: Requires federal contractors to take affirmative action to ensure that employment practices do not discriminate against individuals on account of race, religion, national origin.

President Kennedy issues Executive Order 10980 establishing a presidential commission to examine the status of women and make recommendations to eliminate discrimination based on sex.

Twenty-third Amendment ratified: Confers on residents of the District of Columbia the right to vote for president and vice-president of the U.S.

Hoyt v. Florida: Supreme Court decides that a state may relieve women of the duty of serving on juries.

Mapp v. Ohio: Supreme Court forbids evidence obtained by an unlawful search to be used in a state trial; first application of Fourth Amendment exclusionary rule against states.

1962

Baker v. Carr: Supreme Court decides reapportionment of state legislature is subject to federal judicial review under the equal protection clause of the Fourteenth Amendment and is not withdrawn from the Court's consideration by the political questions doctrine.

Engel v. Vitale: Supreme Court holds state mandated school prayer is a violation of First Amendment ban on establishment of religion.

1963

Equal Pay Act: Congress requires private employers to pay women equally with men for equal work performed.

Gideon v. Wainwright: Supreme Court includes Sixth Amendment, requiring right to counsel in criminal cases, in due process clause of Fourteenth Amendment effective against states.

1964

Mallory v. Hogan: Supreme Court continues incorporation of the Bill of Rights by applying Fifth Amendment right against self-incrimination against the states under the Fourteenth Amendment.

Reynolds v. Sims: Supreme Court applies one person, one vote principle in striking down a state legislative apportionment plan.

Twenty-fourth Amendment ratified: Provides that the right to vote in national elections shall not be denied because of failure to pay any poll tax or other tax.

Escobedo v. Illinois: Supreme Court declares Sixth Amendment right to counsel applies during a pre-trial investigation in a state criminal proceeding; confession obtained where a suspect is not permitted to consult a lawyer and informed of right to remain silent violates the Sixth Amendment.

Civil Rights Act: Congress prohibits discrimination on account of race, color, religion, and national origin in places of public accommodation and programs receiving federal financial assistance; bans discrimination because of race, color, religion, national origin, and sex in private employment and creates Equal Employment Opportunity Commission to enforce the ban; strengthens enforcement of antidiscrimination measures previously adopted in voting and public education.

Heart of Atlanta Motel v. U.S.: Supreme Court declares Civil Rights Act ban on discrimination in places of public accommodation is constitutional under the commerce power.

New York Times v. Sullivan: Supreme Court restricts scope of libel law; rules that the First Amendment protects a false statement about a public official unless made with knowledge of its falsity or with reckless disregard for the truth (i.e. with actual malice).

1965

Griswold v. Connecticut: Supreme Court strikes down state law prohibiting use of contraceptives as a violation

of the right of privacy that is included in the liberty guaranteed by the Fourteenth Amendment.

U.S. v. Guest: Supreme Court decides that Congress has power under Section 5 of the Fourteenth Amendment to prohibit individual private discrimination as well as state action.

Voting Rights Act: Congress authorizes suspension of voting procedures and regulations in states where less than 50 percent of eligible voters are registered to vote or vote; provides for the appointment of federal examiners to supervise elections in states that discriminate; requires covered states to obtain Department of Justice or federal court approval for changes in voting practices and procedures (pre-clearance provision).

President Johnson issues Executive Order 11246: Creates Office of Federal Contract Compliance in the Department of Labor to enforce affirmative action obligation of federal contractors.

1966

Miranda v. Arizona: Supreme Court invalidates confession obtained without advising suspect of right to consult an attorney and remain silent; establishes procedure for state and local law enforcement officers to follow in order to safeguard criminal suspects' rights under Fifth and Sixth Amendments.

South Carolina v. Katzenbach: Supreme Court upholds Voting Rights Act as appropriate legislation under the Fifteenth Amendment.

1967

Age Discrimination in Employment Act: Congress prohibits private employers from discriminating against any individual because of his or her age.

Loving v. Virginia: Supreme Court declares a state law that forbids interracial marriage is a violation of the equal protection clause of the Fourteenth Amendment.

President Johnson issues Executive Order 11375 prohibiting discrimination based on sex in federal contract work.

Katz v. U.S.: Supreme Court decides that the Fourth Amendment protects telephone conversations, and that physical intrusion is not necessary to violate guarantee against unreasonable search and seizure; overrules *Olmstead* v. *U.S.*

1968

Civil Rights Act: Congress prohibits racial and religious discrimination in the sale and rental of housing; makes it a federal crime to cross state lines to incite a riot; extends the Bill of Rights to Indians living on reservations under tribal self-government.

Omnibus Crime Control and Safe Streets Act: Congress authorizes greater latitude in police interrogation of suspects; permits broad use of wiretapping under court-issued warrants; forbids interstate shipment to individuals of pistols and revolvers.

Jones v. Alfred H. Mayer Co.: Supreme Court declares that Civil Rights Act of 1866 (Section 1982 of the U.S. Code) prohibits private discrimination in the sale of property, by authority of the Thirteenth Amendment.

Green v. County Board of New Kent County: Supreme Court rejects freedom-of-choice desegregation plan; imposes affirmative duty of integration on school board as measured by statistics of racial balance in enrollment.

1969

Brandenburg v. Ohio: Supreme Court reverses conviction for violating state criminal syndicalism act; holds state may not proscribe advocacy of the use of force except where speech is "brigaded with action" and directed to inciting imminent lawless action.

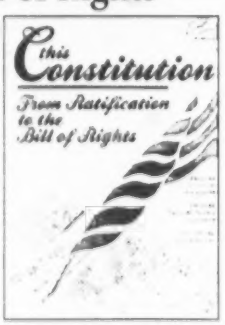
1970

Dandridge v. Williams: Supreme Court decides that state restriction on the amount of welfare payments to families does not violate the equal protection requirement of the Fourteenth Amendment.

Voting Rights Act: Congress lowers the minimum voting age in national and state elections to eighteen.

Understand the Bill of Rights

this Constitution: From Ratification to the Bill of Rights



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Order No. 4 of Office of Federal Contract Compliance: Requires federal contractors to set affirmative action goals and timetables for correcting underutilization of minorities and women.

1971

Swann v. Charlotte-Mecklenburg Board of Education: Supreme Court approves school integration plan based on federal court's remedial powers that includes busing for racial balance.

Griggs v. Duke Power Co.: Supreme Court rules that employers may not use tests and selection instruments that exclude members of minority groups unless the tests are justified by business necessity; adopts disparate impact theory of discrimination under Title VII of the Civil Rights Act of 1964.

New York Times Co. v. U.S.: Supreme Court in per curiam opinion rejects attempt of U.S. to restrain publication of classified Defense Department documents; affirms absolute nature of First Amendment ban on prior restraint.

Twenty-sixth Amendment ratified: Provides that the right to vote of U.S. citizens age eighteen or older shall not be denied by the U.S. or any state on account of age.

Reed v. Reed: Supreme Court holds that state law that favors men over women in estate administration is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment; first time a state law is declared unconstitutional on the grounds of sex discrimination.

1972

Equal Employment Opportunity Act: Congress extends Title VII to state and local governments, educational institutions, employers with more than 15 employees; authorizes Equal Employment Opportunity Commission to enforce Title VII by filing suit in federal court.

Title IX of the Education Amendments: Congress prohibits discrimination on the basis of sex under any education program or activity receiving federal financial assistance.

Congress approves ***Equal Rights Amendment*** and sends it to the states for ratification.

1973

San Antonio School District v. Rodriguez: Supreme Court decides that a state school financing system which permits variations among localities is constitutional under the equal protection clause; rejects argument that wealth is a suspect classification that warrants strict scrutiny judicial review.

Rehabilitation Act: Congress prohibits discrimination against otherwise qualified handicapped individuals on account of their handicap under any program or activity receiving federal financial assistance.

Roe v. Wade: Supreme Court strikes down state law declaring abortion a criminal offense as a violation of right of privacy under the Fourteenth Amendment; declares broad protection for abortion as a constitutional right.

Miller v. California: Supreme Court upholds state obscenity prosecution; asserts that communities can measure obscenity according to local standards.

1974

Federal Election Campaign Act: Congress places limits on campaign contributions and spending.

1975

Age Discrimination Act: Congress prohibits discrimination based on age in programs receiving federal financial assistance.

1976

General Electric Co. v. Gilbert: Supreme Court rules that exclusion of pregnancy from a private employer's disability plan is not sex discrimination under Title VII of the Civil Rights Act.

Craig v. Boren: Supreme Court invalidates state law permitting discrimination in the sale of beer to males and females of the same age; asserts intermediate standard of judicial scrutiny for sex discrimination cases that stops short of declaring gender a suspect classification.

Washington v. Davis: Supreme Court holds that intent to discriminate must be shown in proving a violation of the equal protection clause of the Fourteenth Amendment; rejects disparate impact theory of discrimination for constitutional cases.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council: Supreme Court strikes down state law prohibiting advertising the price of prescription drugs; decision confers substantial protection for commercial speech under the First Amendment.

1977

United Jewish Organizations of Williamsburgh, Inc. v. Carey: Supreme Court approves the use of racial criteria by state in redistricting policy aimed at compliance with the Voting Rights Act.

1978

Regents of the University of California v. Bakke: Supreme Court finds racial quota in medical school admissions policy is a violation of white applicant's Title VI right not to be discriminated against in a program receiving federal financial assistance; approves use of race as a factor in college and professional school admissions policies in order to promote diversity or overcome the effects of past discrimination.

Pregnancy Discrimination Act: Congress prohibits employers from discriminating against women by treating pregnancy differently from any other disability.

Elaine Martin, first woman cable splicer for Southwestern Bell Telephone Co., 1973. D.C. Public Library.

1979

United Steelworkers of America v. Weber: Supreme Court rejects claim of reverse discrimination by white worker against a racial quota; approves voluntary affirmative action plan that selects applicants to training program on racial basis according to an absolute quota.

1980

Fullilove v. Klutznick: Supreme Court upholds broad congressional power to use racial classification in legislation for remedial purposes; approves 10 percent minority set-aside requirement contained in Public Works Employment Act of 1977.

1981

Rostker v. Goldberg: Supreme Court decides that a law requiring military draft registration that excludes women is constitutional.

1982

New York v. Ferber: Supreme Court approves state law banning the use of minors in any sexual performance for the preparation of visual materials; designates child pornography as a new category of expression excluded from constitutional protection under the First Amendment.

Voting Rights Act: Amendment to statute establishes a results test whereby the number of minority group individuals elected to office is relevant to determining whether unlawful discrimination against blacks has occurred.

Deadline expires for ratification of Equal Rights Amendment after Congress has extended it for three years; number of ratifying states is three short of the required number.

1984

U.S. v. Leon: Supreme Court permits an exception to the exclusionary rule where police officer reasonably relies on a search warrant that is later found to be invalid.

1986

Bowers v. Hardwick: Supreme Court rejects claim that state antisodomy law violates the right of privacy of homosexuals under the due process clause of the Fourteenth Amendment.

1987

Johnson v. Transportation Agency Santa Clara County: Supreme Court rejects reverse discrimination claim; upholds voluntary affirmative action plan of public employer in which race and sex can be legitimately considered in order to correct underrepresentation not caused by past unlawful discrimination.

Nollan v. California Coastal Commission: Supreme Court declares state land regulation to be a taking of private property for a public purpose that requires just compensation under the Fifth and Fourteenth Amendments.

1988

Civil Rights Restoration Act: Congress reverses Supreme Court decision in *Grove City College* v. *Bell* (1984) which limited the scope of federal funding cutoff in educational programs that discriminate.

Civil Liberties Act: Congress apologizes and provides redress for violating the constitutional rights of American citizens of Japanese ancestry and permanent resident aliens who were relocated and held in detention camps from 1941 to 1945.

1989

Texas v. Johnson: Supreme Court holds that burning the American flag is an act of symbolic speech protected by the First Amendment.

1990

Americans with Disabilities Act: Congress prohibits discrimination against individuals with disabilities; requires state and local governments, businesses, and other private entities to make necessary changes in policies and facilities to guarantee equal opportunity and access to disabled individuals.

Sources: Michael Les Benedict, *Civil Rights and Civil Liberties* (Washington: American Historical Association, 1987); Richard L. Cortner, "Civil Rights and Liberties before the Civil War," and "Civil Rights and Liberties from the Civil War to 1937," in *This Constitution: A History* (Washington: International University Consortium and American Historical Association, 1987); Michel R. Belknap, "Contemporary Civil Liberties," and "The Quest for Equality," in *This Constitution: A History* (Washington: International University Consortium and American Historical Association, 1987); *Encyclopedia of the American Constitution*, ed. Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney (4 vols., New York: Macmillan, 1987); Earlean M. McCarrick, "The Supreme Court and the Evolution of Women's Rights," ***this Constitution***, No. 13 (1986), pp. 4–11.

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Project '87

The Bicentennial of the Bill of Rights

This special issue of ***this Constitution: The Bicentennial of the Bill of Rights*** has been produced with funding from the Ford Foundation. Eighteen issues of ***this Constitution: A Bicentennial Chronicle*** were published by Project '87 from 1983 through mid-1988, with support provided by the National Endowment for the Humanities. The publisher, Project '87, has been a joint venture of the American Historical Association and the American Political Science Association. Project '87 was founded in 1977 by Richard B. Morris and James MacGregor Burns, then presidents of the two scholarly associations, and was established in order to promote scholarship, education, and public understanding of the United States Constitution on the occasion of its Bicentennial. Through its publication as a quarterly magazine, ***this Constitution*** addressed all three objectives, providing a vehicle for constitutional scholars to write for educators, students, the public, and each other.

Project '87 is completing its activities in 1991, coinciding with the Bicentennial of the ratification of the Bill of Rights. Over this period of time, core support for Project '87 came from the William and Flora Hewlett Foundation. Grants for specific projects were awarded by the National Endowment for the Humanities, the Andrew W. Mellon Foundation, the Lilly Endowment, Inc., of Indianapolis, Indiana, the Rockefeller Foundation, the CSX Foundation, the Exxon Education Foundation, the AT&T Foundation, and the Ford Foundation which provided support to initiate Project '87 and funded other education and public programs in addition to this magazine.

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